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Supreme Court, U.S.
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No. (1)

SUPREME COURT OF THE UNITED STATES

October Term, 2007

WE THE PEOPLE, et al.,

Petitioners,

- against -

UNITED STATES, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The full and fair question is, if "Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to Petition the government for Redress of Grievances" (First Amendment), and if "The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People" (Ninth Amendment) and if, "The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"(Fourth Amendment) and if, "No person shall be...deprived of life, liberty, or property without Due Process of law...." (Fifth Amendment), and if the **Constitution must be construed in its entirety**, and if the Government has committed acts that have violated that Constitution, do Plaintiffs acting in their individual **private** capacities have a Right to an official response from Government to their Petitions for Redress of **constitutional torts**, and if **Government refuses to respond** to those Petitions, are the People not then free to **retain their money** until their Grievances are Redressed and, if the People do withdraw their financial support from the Government for that reason, is the Government not then **prohibited from retaliating** against those People by enforcing the internal revenue laws against those People via summonses, liens, levies and seizures, and prosecutions, and otherwise seeking to prevent those People from freely Speaking out and Associating with other People for the purposes of furthering public debate, altering the way the Government operates, and exposing and correcting those un-Constitutional acts?

PARTIES

Due to the large number of individual named Plaintiffs (1450), the names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in a separate Certificate as to Parties.

With regard to the two corporate Plaintiffs, the We The People Foundation for Constitutional Education, Inc., and the We The People Congress, Inc., both are not- for- profit corporations, neither has a parent company and neither has issued any stock.

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IN THE
SUPREME COURT OF THE UNITED STATES

WE THE PEOPLE, et al.

Petitioners

- against -

UNITED STATES, et al.

Respondents

OPINIONS BELOW

The ORDER of the United States Court of Appeals for the District of Columbia Circuit, filed August 3, 2007, denying petition for rehearing en banc. 2007 U.S. App. LEXIS 18716 (D.C. Cir., Aug 3, 2007).

The ORDER of the United States Court of Appeals for the District of Columbia Circuit filed May 11, 2007, dismissing as moot, motion for injunctive relief, motion to expedite ruling and motion for post-argument communication. 2007 U.S. App. LEXIS (D.C. Cir., May 11, 2007).

The OPINION of the United States Court of Appeals for the District of Columbia Circuit filed May 8, 2007, affirming the judgment of the District Court. 485 F.3d 140.

The OPINION AND ORDER of the United States District Court for the District of Columbia filed August 31, 2005, granting defendants' motion to dismiss the complaint and denying plaintiffs' motion to amend the complaint. 2005 U.S. Dist. LEXIS 20409 (D.D.C., 2005).

JURISDICTION

The Order sought to be reviewed was filed May 8, 2007. The Order denying rehearing was filed on August 3, 2007. This Court has jurisdiction under 28 U.S.C. Section 1257.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution reads in relevant part: "**Congress shall make no law...abridging...the right of the people...to petition the government for a redress of grievances.**"

2. The First Amendment to the United States Constitution reads in relevant part: "**Congress shall make no law...abridging the freedom of speech....**"

3. The First Amendment to the United States Constitution reads in relevant part: "**Congress shall make no law...abridging...the right of the people peaceably to assemble....**"

4. The Fourth Amendment to the United States Constitution reads in relevant part: "**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation ...**"

5. The Fifth Amendment to the United States Constitution reads in relevant part: "**No person shall be...deprived of...liberty, or property, without due process of law....**"

6. The Ninth Amendment to the United States Constitution reads in full: **"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People."**

7. The Internal Revenue Code, 26 U.S.C. Sections 6700 and 6701. See Appendix N for the text of each.

STATEMENT OF THE CASE

A. OVERVIEW

This Complaint arises from the failure of the President of the United States and his Attorney General and his Secretary of the Treasury and his Commissioner of the Internal Revenue Service, and the failure of the United States Congress, to respond to Plaintiffs' four Petitions for Redress of Grievances against the Government.

Plaintiffs Petitioned government Defendants in an attempt to reconcile and remedy conflicts between the war powers clauses of the Constitution and the Iraq Resolution, the "privacy" clauses of the Constitution and the USA Patriot Act, the money clauses of the Constitution and the Federal Reserve System, and the taxing clauses of the Constitution and the direct, un-apportioned tax on labor.

This complaint also arises from the Executive Branch of the United States government in its retaliation against Plaintiffs for claiming and exercising Natural, unalienable Rights guaranteed by the First and Ninth Amendments.

Plaintiff "We The People Foundation for Constitutional Education Inc." is a non-partisan, tax-exempt, not--for--profit research and educational foundation in good standing and organized under the Laws of the state of New York. The Foundation has been spearheading, since 1999, a nationwide effort to obtain answers from the Government to specific questions served upon the Government as part of their Petitions for Redress regarding the Government's violation of the war powers, money, "privacy" and tax clauses of the Constitution.

Plaintiff "We The People Congress" is a non-partisan, membership organization in good standing and organized as a not--for--profit Corporation under the Laws of the state of New York. With thousands of members nationwide, with county and state coordinators in nearly all States of the Union, the mission of the We The People Congress, Inc. is to scrutinize governmental behavior at every level, compare that behavior with the requirements of the State and federal Constitutions, and intelligently, rationally, professionally, pro-actively and non-violently confront unconstitutional and unlawful behavior by elected and/or appointed public officials, regardless of their political party.

Plaintiff Schulz is the Chairman of We The People organization.

The remaining (1450) Plaintiffs are individuals residing in all 50 states of the Union.

By communicating information, associating with like minds, expressing facts and opinions, reciting Grievances, protesting abuses and praying for

answers to specific questions, Plaintiffs have given expression essential to the end that under our system of limited government the government Defendants must be held accountable to the Constitution and to the Sovereignty of the People, and that Redress to which the People are entitled may be secured by lawful and peaceful means.

The Defendants have refused to respond to Plaintiffs' repeated Petitions for Redress of constitutional torts.

Knowing that with every Natural Right of the People there is an obligation of the Government, and that a Right that is not enforceable is not a Right, and wishing to peaceably enforce their unalienable Rights, some, but not all Plaintiffs decided to give further expression to their Right of Enforcement by retaining their money until their Grievances are Redressed.

Individual Plaintiffs believe that such further expression by them is not an abuse of the internal revenue laws, but an inextricable extension of their Natural Rights to government accountability and to the peaceful procurement of relief from unconstitutional acts through enforcement as guaranteed by the First and Ninth Amendments, and that any intervention by Defendants against such expression of these Rights constitutes a direct and substantive curtailment of those Rights and is strictly forbidden – that is, constitutionally impermissible.

However, after publicly uttering their unequivocal intention to respond to Plaintiffs through "tax code enforcement actions," Defendants have indeed

pursued a broad range of attacks upon Plaintiffs and their supporters under the guise of enforcing the internal revenue laws, accusing Plaintiffs of promoting an "abusive tax shelter," a crime under Section 6700 of the Internal Revenue Code, and actively seeking the identification information of all People who have in any way at all supported the process of Petitioning the Government for Redress of said constitutional torts, call those People "customers" and "investors" who need to be "examined" and "audited" by the IRS, for the purpose of "protecting the public fisc."

Plaintiffs have suffered, and continue to suffer significant retaliation and injuries at the hands of Defendants for claiming and exercising constitutionally protected Rights.

This appeal is a constitutional challenge seeking declaratory and injunctive relief.

B. STATEMENT OF FACTS

Plaintiffs have engaged since 1999 in "a nationwide effort to get the government to answer specific questions" regarding what Plaintiffs view as the Government's "violation of the taxing clauses of the Constitution" and "violation of the war powers, money and 'privacy' clauses of the Constitution." Joint Appendix ("J.A.") 80 (Am. Compl. P 3). Plaintiffs submitted Petitions for Redress containing extensive lists of inquiries to various government agencies. On March 16, 2002, for example, Plaintiffs submitted a Petition with hundreds of inquiries regarding the tax code to Congress and to various parts of the Executive Branch, including the

Department of Justice and the Department of the Treasury. On November 8, 2002, Plaintiffs presented four Petitions to every Member of Congress. Those Petitions concerned the Government's war powers, privacy issues, the Federal Reserve System, and the Internal Revenue Code. On May 10, 2004, Plaintiffs submitted a petition regarding similar issues to the Executive Branch, including the Department of Justice and the Department of the Treasury.

The Legislative and Executive Branches have responded to the repeated Petitions with "total silence and a lack of acknowledgment." J.A. 85 (Am. Compl. P 35).

On numerous occasions Plaintiffs have sought to publicly meet with the Defendants and to secure from the Defendants official answers to these reasonable questions regarding these acts of Defendants believed by Plaintiffs to be repugnant to, and outside the authority lawfully granted by the People to their government by, the U.S. Constitution and certain Acts of Congress. A detailed account of the Petition process is provided in an Affidavit to the District Court. J.A. 104-134 (Aff. by Schulz).

What the record shows is that Plaintiffs have respectfully, intelligently and rationally contacted their Congresspersons and appropriate officials within the Executive branch, including the President, literally begging for someone in government to provide official answers to pertinent questions relating to alleged violations of the war powers, money, "privacy" and tax clauses of the Constitution.

Despite these repeated Petitions for Redress, Defendants have steadfastly refused to respond. Instead of a respectful response there has been institutionalized contempt and a condescending and antagonistic attitude by Defendants, eventually leading to overt retaliation.

Plaintiffs acted upon the Government's refusal to respond.

By claiming and exercising their unalienable Right under the First Amendment to hold the Government accountable to the Constitution, and their Right under the First and Ninth Amendments to Redress Before Taxes, some Plaintiffs formally Noticed the Executive and Legislative departments that as a consequence of the Government's refusal to respond, Plaintiffs were withdrawing their financial support from the Government until the Government responded to the Petitions for Redress, and that they would be encouraging others to do the same by publicly advocating "No Answers, No Taxes." Joint Appendix ("J.A.") 129,130 (Affidavit, P 67, 71, 73).

The Executive branch reacted by retaliating against Plaintiffs. First, on April 4, 2003, the IRS announced that under Section 6700 of the internal revenue laws it was initiating a formal investigation of Plaintiffs for promoting an "abusive tax shelter."[1]

Then, under the pretense of its "6700 investigation" the IRS initiated a broad based "enforcement" program (referred to by Plaintiffs in the pleadings as

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[1] See Appendix L, page A-58 for a copy of the letter. Section 6700 penalizes persons for promoting illegal tax shelters.

the IRS's "WTP-6700" enforcement program), which was clearly documented as an official IRS program and policy specifically designed and intended to chill the enthusiasm of people of ordinary firmness to continue their efforts to hold the Government accountable to the Constitution, thereby shutting down the Petition process and silencing Plaintiffs. At each step, the IRS has sought the confidential private records containing the identities of all people associated with Plaintiffs or who might have supported the Petition process or merely obtained copies of Plaintiffs' Speech. The IRS admitted its purpose was to subject those associates and supporters to "examination."

The IRS began its WTP-6700 enforcement program by serving Plaintiffs with a series of summonses demanding private books and records, including complete identification information of all associates and supporters.

Plaintiffs reacted in two ways.

First, Plaintiff Schulz petitioned the U.S. District Court to quash the Summonses on the ground that Plaintiffs' activities and speech were protected by the First and Ninth Amendments (**relying heavily on contemporary historical understanding and practices**), and that the summonses were improperly issued to chill the enthusiasm of Plaintiffs and their associates who were claiming and exercising constitutional Rights. Plaintiff argued such was not a legitimate purpose for the summonses and that the IRS was acting in bad faith. The U.S. Court of Appeals for the Second Circuit *twice* ruled against the IRS. The Court held that in the interest of

Plaintiff's Right to Due Process, the IRS was not entitled to Plaintiff's private books and records without a court order, and that to get a court order the IRS would have to bring Plaintiff to federal District Court where Plaintiffs could be entitled to an adversarial proceeding and a hearing. See *Schulz I* and *Schulz II*.[2]

Second, 1450 Plaintiffs (all signatories to the four Petitions for Redress of Grievances) filed an action for declaratory and injunctive relief in the U.S. District Court, seeking a declaration of their Rights and the obligations of the Government under the First and Ninth Amendments. **It is that action that is the subject of this petition for Writ of Certiorari.**

In 2005, within weeks of the 2nd Circuit's ruling in *Schulz I*, IRS served two summonses on PayPal (an on-line financial transaction company), each seeking identification information of persons associating with Plaintiffs, supporting the Petition process, or obtaining copies of Plaintiffs' Speech.

One of the summonses was served on PayPal in San Jose, and the other was served on PayPal in Omaha, forcing Plaintiffs to petition both the US District Court for the Northern District of California and the District of Nebraska to quash the two new Summonses. Plaintiffs again argued that Plaintiffs' activities and Speech were protected by the First and Ninth Amendments (**relying heavily on contemporary historical understanding and practices**), and that the summonses were issued to

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[2] *Schulz v IRS*, 395 F.3d 463 (2d Cir., Jan. 2005)(*Schulz I*); *Schulz v. IRS*, 413 F.3d 297 (2d Cir., June 2005) (*Schulz II*).

chill the enthusiasm of Plaintiffs and their associates who were claiming and exercising constitutional Rights. Plaintiffs argued such was not a legitimate purpose for the summonses and that the IRS was acting in bad faith. However, both Circuits denied the petitions to quash, finding (without explanation in any cognizable judicial terms, strict scrutiny or a hearing) that Plaintiffs' constitutional arguments were "unpersuasive." They held that the IRS summonses had a "legitimate purpose."[3]

There have been many other "enforcement actions" initiated against the Plaintiffs under the pretense of an investigation of an alleged "commercial" "abusive tax shelter." Many are detailed in Plaintiffs' emergency motion for injunctive relief that was filed with the DC Circuit Court in this case on October 4, 2006.[4]

C. FEDERAL JURISDICTION IN DISTRICT COURT

The court of original instance, the U.S. District Court for the District of Columbia, had jurisdiction under 28 U.S.C. Section 1331.

REASONS FOR GRANTING THE WRIT

Petitioner presents four reasons for granting the Writ:

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[3] *Schulz v United States*, (Case No. 05-17388, 9th Cir., April 27,2007); and *Schulz v United States* (Case No. 06-2891, 8th Circuit, September 13, 2007).

[4] Denied on May 11, 2007, following the DC Court's May 8th decision.

1) A United States Court of Appeals has decided a question of extreme public importance that has not been, but should be settled by this Court;
2) A United States Court of Appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power;
3) A United States Court of Appeals has entered a decision that conflicts with recent decisions of four other United States Courts of Appeal.
4) A United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

1. THIS IS A FIRST IMPRESSION QUESTION OF EXTREME PUBLIC IMPORTANCE

This proceeding involves a first-impression question of exceptional constitutional importance. The First Amendment is arguably the single most important sentence in the Constitution. Essential, unalienable, individual Rights were guaranteed by that sentence, including the Rights of the People to Petition the government for Redress to cure unconstitutional behavior. A decision denying these Rights, or even placing limitations upon them, is of exceptional constitutional importance.

The full and fair question is, if "Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to Petition the government for Redress of Grievances" (First Amendment), and if "The

enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People" (Ninth Amendment) and if, "The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"(Fourth Amendment) and if, "No person shall be...deprived of life, liberty, or property without Due Process of law...." (Fifth Amendment), and if the **Constitution must be construed in its entirety**, and if the Government has committed acts that have violated that Constitution, do Plaintiffs acting in their individual **private** capacities have a Right to an official response from Government to their Petitions for Redress of **constitutional torts**, and if **Government refuses to respond** to those Petitions, are the People not then free to **retain their money** until their Grievances are Redressed and, if the People do withdraw their financial support from the Government for that reason, is the Government not then **prohibited from retaliating** against those People by enforcing the internal revenue laws against those People via summonses, liens, levies and seizures, and prosecutions, and otherwise seeking to prevent those People from freely Speaking out and Associating with other People for the purposes of furthering public debate, altering the way the Government operates, and exposing and correcting those un-Constitutional acts? ("the Question").

If the American People are truly free, with Natural, unalienable Rights endowed by the Creator rather than privileges granted by the state, and if those Rights are **individual** Rights, and if the federal government is truly a servant government established by the Sovereign People to secure those

individual Rights, and if the power of the government to act is strictly limited by the original meaning of the words of the U.S. Constitution, and if the People have evidence that government officials in the political branches have stepped outside the boundaries drawn around their power and are acting in spite of constitutional prohibitions, and if the People have intelligently, rationally, professionally, non-violently and repeatedly Petitioned those officials in the political branches with proper statements of Grievances and proper prayers for Relief, and if the government officials have decided to ignore the People's Petitions, fail to justify their alleged constitutionally tortuous behavior and refuse be held accountable to the Constitution and the Bill of Rights, then it is Plaintiffs' contention, based on common sense and the historical context and purpose of the Bill of Rights, that the People have the Natural, unalienable Right to defend the Constitution and enforce their individual Rights by retaining money wanted by those government officials, until their Grievances are Redressed, and to exercise such Rights without retaliation or infringement by the government.

No court has decided this question, although in recent months five Circuit Courts, including the DC court in the instant case, have issued conflicting opinions as to the meaning of the Petition Clause and its collateral Rights. (see part 3 below).

The Right to government limited by the Constitution and based upon the consent of the governed is among the most precious of the Great Rights and Liberties guaranteed by the Bill of Rights. The value in the Bill of Rights, particularly the Right to Petition, as

an essential element in the direct, practical exercise of Popular Sovereignty and self-government is beyond question. It is, after all, the only way for the individual and the small group to secure their unalienable Rights against the majority, and to directly and peacefully hold the government accountable to the Constitution.

This "capstone" Right to Petition the government for Redress of Grievances is critical in maintaining the balance of power between the People and the (servant) government and in preserving an environment conducive and protective of free political discourse, to the ends that government may be held accountable to the People, the Constitution and the Law, and that abuses of power may be curtailed and cured by peaceful means. Therein lies the very foundation of constitutional government and the Freedom of the People.

The Opinion by the DC Circuit Court in this case has, in error, removed the People's procedural instrument embedded within the Constitution for holding the Government accountable to the Constitution and Bill of Rights, thereby drastically dismantling the original balance of power between the People and the Government.

If left undisturbed, the Opinion would remove the capstone Right – the linchpin of the constitutional system of checks and balances – essential for the protection and preservation of the Constitutional Republic and its essential underlying principles of individual Rights, separation of powers, self-government and Popular Sovereignty.'

If left undisturbed, the Opinion would eviscerate the legal and functional substance of the capstone Right of the Bill of Rights -- i.e., the Right of the People to peacefully hold the Government accountable to the war, tax, money, privacy, and other provisions of the Constitution -- by denying the People their Right to a Response from the Government to their Petitions for a Redress of constitutional torts, and by denying the People their Right to peacefully enforce their Rights by retaining their money until their Grievances are Redressed (not to be confused with the retention of money by individuals in protest of one government policy over another on non-constitutional, i.e., "garden variety" political matters).

After all, the Petition for Redress is to the individual, the minority and the Constitutional Republic, what the ballot is to the majority and a pure democracy. Stripped of its original intent and power, the Petition Clause becomes nothing more than a redundant Expression clause, leaving the People with no apparent means of preserving their unalienable Rights -- i.e., the very antithesis of the intent of the Framers as evidenced by contemporary historical understanding and practices.

The Supreme Court has confirmed that, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances" (*United States* v. *Cruikshank*, 92 U.S. 542, 552), and has recognized that the First Amendment expressly guarantees that right against abridgment by Congress as a Right that cannot be denied without violating those fundamental principles of liberty and justice that lie

at the base of all civil and political institutions (*Hebert* v. *Louisiana*, 272 U.S. 312, 316 and *Powell* v. *Alabama*, 287 U.S. 45, 67), and has recognized this Right to Petition as one of "the most precious of the liberties safeguarded by the Bill of Rights" (*Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222), making explicit that, "the right to petition extends to all departments of the Government," and that "the right of access to the courts is . . . but one aspect of the right of petition" (*California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510).

The zone of interest to be protected by the Petition Clause goes beyond the Clause itself to all Natural Rights. The Petition Clause guarantees the Right to hold government accountable to each provision of the Constitution through citizen participation in their Right to self-government.

The question now before this Court has profound moral, legal and practical implications.

The First of the Grand Rights is that governments are created by the People to serve and protect the People and their individual Rights. This Right is, as the Declaration of Independence proclaims, unalienable. This Right is, as the Magna Carta demonstrates, the cradle of Liberty, forming the cornerstone of Western Civilization and our system of Law and Justice. This Right is articulated by the last ten words of the First Amendment. This Right is nothing less than the legal, procedural device by which We the People practically exercise self-governance and Popular Sovereignty, as individuals and as groups.

Plaintiffs have Petitioned the Judicial department to declare their Rights and the Government's obligations with respect to the First Amendment and the Ninth Amendment. They have Petitioned the Judiciary to declare their corollary Rights expressly articulated by the Founders in both the Declaration of Independence and the Journals of the Continental Congress, and as were exercised before, during and after the guarantees were added to the Constitution, amply demonstrated by contemporary historical understanding.

The People have not found it necessary to couple, claim and exercise these Rights. Consequently, until recently, no American court has ever been asked to undertake the difficult task of publicly declaring this self-evident truth.

Today's headlines chronicle the pace and breadth at which Individual Liberties are being eroded and the extent to which those that run the government are prone to step outside the boundaries drawn around their power by the terms and limitations of the Constitution and Bill of Rights.

Fortunately, we have something our Founding Fathers did not have – the one thing of inestimable value that they left to succeeding generations – the Constitution of the United States of America.

However, the Constitution cannot defend itself. While the People are the final arbiters, the Judiciary is to protect the People and their Rights by holding sacred the essential Founding Principles and forever embracing the Rule of Law. It is axiomatic that without the protections of Fundamental Law, the

government--the creation and servant of the People, cannot be restrained.

This Court has before it a landmark, first impression, First Amendment question of almost immeasurable importance and consequence to Liberty.

The Court now has the opportunity, as the independent, co-equal branch intended by the People, to hear this case, address and determine the question, and declare the meaning of the full contours of the accountability clauses of the Constitution.

2. THIS COURT'S SUPERVISORY POWER IS REQUIRED

In the absence of any case law on point, Plaintiffs' interpretation of the Accountability/Petition Clause has relied on contemporary historical understanding and practices, which DC Circuit Court Judge Rogers in her separate opinion states is "consistent with the Supreme Court's traditional interpretive approach to the First Amendment."

By failing to take into consideration plaintiffs' emphasis and reliance on contemporary historical understanding and practices, and by failing to subject Plaintiffs' First Amendment questions to strict scrutiny or a hearing, the lower court so far deviated from the Supreme Court's traditional interpretive approach to the First Amendment that this court's supervisory power is required.

The Plaintiffs have properly claimed and exercised their Rights under the First and Ninth Amendments by Petitioning the Government for Redress of four constitutional torts. However, the Government has arrogantly refused to respond to the Plaintiffs or their repeated Petitions for Redress. To enforce their Natural Right to hold the Government accountable to the Constitution, some, but not all of the Plaintiffs in this case decided to peaceably procure relief by retaining their money until their Grievances were Redressed, a Right guaranteed by the First and Ninth Amendments and clearly supported by the historical record.[5]

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[5] "If money is wanted by Rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility." Continental Congress To Inhabitants of Quebec, an Act passed unanimously by the Congress. Journals of the Continental Congress. Journals 1:105-113. See Appendix O herein at page A-72, fifth paragraph.

"The privilege of giving or withholding our moneys is an important barrier against the undue exertion of prerogative which if left altogether without control may be exercised to our great oppression; and all history shows how efficacious its intercession for redress of grievances and reestablishment of rights, and how improvident would be the surrender of so powerful a mediator." Thomas Jefferson: Reply to Lord North, 1775. Papers 1:225.

See also Appendix M hereto for details of the Historical Record of the Right to Petition. The full text of Appendix M was included in the pleadings and appears in the record of each of the three cases now before the Court.

Because this is a case of first impression involving a First Amendment prohibition whose meaning cannot be determined by the plain language approach to interpretation, it was necessary for Plaintiffs to apply and argue the contemporary historical understanding and practice, or "Framers' Intent," approach to the interpretation of the constitutional prohibitions.

Plaintiffs' full original intent argument is included in **Appendix M** hereto. The following is a summary of Plaintiffs' argument.

The Right is traced back to section 61 of the Magna Carta (1215) when the monarchy (King John) agreed: 1) that the People could Petition the King for redress of grievances; 2) that the King had 41 days to respond; and 3), that if the King failed to respond, the People could enforce their Rights by throwing off the King and his government, and seizing the King's castles, land and everything else belonging to the King except his life and that of the Queen and his children. See Appendix M at page A- 59 for the text of Section 61 of the Magna Carta.

From then on in England, people claimed and exercised the Right to Petition the Government for Redress of Grievances, giving rise to recognition of the "derivative Rights" including free Speech, free Press and free Assembly (i.e., it being necessary to speak, write and meet with others in support of the Petitions for Redress).

In the American colonies, Petitions to Government for Redress of Grievances were received and submitted to committees for prompt consideration

and response. It was unthinkable in those days that the Government would fail to consider and respond to the People's Petitions for Redress. Petitions changed the way Government operated. In fact, Akil Amar writes in his law review article that more state legislation came as a result of Petitions for Redress than for any other reason. See, THE BILL OF RIGHTS AS A CONSTITUTION, Akhil Reed Amar, 100 Yale L.J. 1131 (March, 1991).

In 1774, the same Continental Congress that adopted the Declaration of Independence passed an eight-page Act, unanimously, that proclaimed the first of the Grand Rights of the People was "government based on the consent of the people." In the very next paragraph, the Congress proclaimed the collateral Right of the People to withhold their allegiance and support from the Government by retaining their money until their Grievances were redressed. See Appendix O at page A-71 for the full text of the Act.

In 1776, the Declaration of Independence clearly shows that the capstone Grievance was the failure of the British government to respond to the colonists' Petitions for Redress of Grievances. That failure was the proverbial "straw that broke the camel's back," the ultimate violation of the Rights of the People that led the colonists to throw off their government of 150 years.

In 1791, the People added the Right to Petition to the First Amendment in the American Bill of Rights, as the capstone Right, capping all others.

Until 1830, it was unthinkable for Government at any level in America not to respond to Petitions for

Redress of Grievances, for fear of the Right of the People to enforce their Rights by withdrawing their allegiance and financial support. Even U.S. Congressmen submitted all Petitions for Redress of Grievances to a Committee for consideration and response. Every Wednesday Congress considered the Petitions for Redress.

In 1830, Southern Congressmen, frustrated by the flood of Petitions from People Grieving the issue of the Rights of slaves, managed to pass a procedural rule in Congress that permanently tabled any additional Petitions on the subject of slavery.[6]

It took John Quincy Adams five years to repeal the rule, but the precedent was established. That precedent became the basis of another and so forth, until the full contours of the meaning of the Right to Petition had become all but forgotten -- until 1985.

The Supreme Court had only to mention the Right to Petition in 1985 to wake up the scholars.[7] Following *MacDonald v Smith,* ten law review articles on the subject of the Right to Petition were published. None had ever been published before 1986. Included were extraordinary works on the history, meaning, effect and significance of the Right to Petition, especially

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[6] It might not have taken 35 years and a civil war to end slavery in America had the Government, for the first time in American history, not failed to respond to the People's Petitions for Redress.

[7] In *MacDonald v. Smith*, 472 U.S. 479 (1985) the Supreme Court held that just as the Right of Free Speech is not absolute (one can't yell "fire" in a dark crowded theater, the Right to Petition for Redress is not absolute (one can't liable or defame another).

those by Prof. Gregory Mark at Rutgers and Prof. Akil Amar at Yale. For a list of the ten Law Journal articles, see Appendix M, fn 5 at page A-62.

The DC District Court erred in deciding this constitutional question without taking Plaintiffs' original intent argument into consideration. This is particularly difficult for the Plaintiffs to accept in view of what Circuit Judge Rodgers had to say in her concurring opinion, to wit:

> "That precedent [*Smith* and *Knight*], however, does not refer to the historical evidence and we know from the briefs in *Knight* that the historical argument was not presented to the Supreme Court...The Supreme Court's interpretation of the Constitution has been informed by the understanding that ...it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth...the Supreme Court has rejected a pure textual approach in favor of an analysis that accords weight to the historical context and the underlying purpose of the clause at issue...In the context of the First Amendment, the Supreme Court has repeatedly emphasized the significance of historical evidence...Appellants point to a long history of petitioning and the importance of the practice in England, the American Colonies, and the United States until the 1830's as suggesting that the Right to petition was commonly understood at the time the First Amendment was proposed and ratified to include duties of consideration and response...Even those who take a different view, based on a redefinition of the question and differences between English and

> American governments, acknowledge that there is 'an emerging consensus of scholars' embracing appellants' interpretation of the right to petition....the historical context and underlying purpose have been the hallmarks of the Supreme Court's approach to the First Amendment...Of course, this court cannot know whether the traditional historical analysis would have resonance with the Supreme Court in a Petition Clause claim such as appellants have brought...No doubt it would present an interesting question. For now it suffices to observe that appellants' emphasis on contemporary historical understanding and practices is consistent with the Supreme Court's traditional interpretive approach to the First Amendment." (footnotes and citations omitted).

The Court's attention is invited to the full argument put forth by Circuit Judge Rogers in her separate opinion, seemingly quite supportive of a decision by the Supreme Court to consider this "interesting question.".

3. THE DC CIRCUIT'S DECISION CONFLICTS WITH OTHER RECENT CIRCUIT COURT DECISIONS.

The decision by the DC Circuit Court conflicts with the recent decision in *Van Deelen* (10th Cir., 2007), and with three other Circuit Court decisions involving these Plaintiffs. In recent months there have been five conflicting decisions issued by five Circuit Courts, including the matter before the bar, regarding the meaning of the Petition Clause as follows:

1. *We The People v U.S.*,485 F.3d 140 (DC Cir.,2007)
   See Appendix D at page A-4 for a copy. This case.
2. *Schulz v U.S.*, (No. 06-2891, 8th Cir., 2007)
   See Appendix G at page A-26 herein for a copy.
3. *Schulz v U.S*, (No. 05-17388, 9th Cir., 2007).
   See Appendix H at page A-28 herein for a copy.
4. *U. S. v. Astrup*, (Case No. 05-5701, 2nd Cir., 2006).
   See Appendix J at page A-39 herein for copy.
5. *Van Deelen v. Marion Johnson*, ___ F.3d ___
   (Case No 06-3305, 10th Cir. August 14, 2007).
   See Appendix K at page A-44 herein for a copy.

The instant Petition for Writ of Certiorari is a result of the first decision listed above.

Because these decisions, except the Van Deelen decision (No. 5 above), involve the same underlying legal controversy, the same basic facts, and generally the same parties, the full question at the heart of this case was presented in virtually identical fashion to the DC, Eight, Ninth and Second Circuits. Conflicting determinations of the critically important constitutional question were issued in all the cases.

The DC, Eight, Ninth and Second Circuit Courts reached the same result; that is, that the Executive and Legislative branches **do not have to respond** to the Petitions of private Citizens seeking Redress of constitutional torts and, therefore, the private Citizens have no Right to retain their money until their Grievances are Redressed and, therefore, the Government is free to enforce the internal revenue laws against anyone retaining his money until his Grievances are Redressed and the Courts are blocked

from providing injunctive relief by the Anti-Injunction Act under the Internal Revenue Code.

However, the four Circuit Courts reached the result in different ways – a virtual smorgasbord of approaches has been used by the four Circuit Courts to defeat the question all, we suggest, are in error. The decisions appear not to be in cognizable judicial terms.

The DC Circuit, relying on *Smith* and *Knight*,[8] held that government does not have to listen or respond to People who Petition the Government for Redress of Grievances.[9] The DC Circuit Court erred: *Smith* and *Knight* are distinguishable on the facts and the law, and are not dispositive.

In her separate opinion, DC Circuit Judge Rogers distinguished the instant case from *Smith* and *Knight*, recognizing that the legally significant contemporaneous, historical context and purpose of the accountability clause, as argued by Plaintiffs in this case was not argued in *Smith* and *Knight*. In addition, *Smith* and *Knight* were cases involving job related grievances by public employees and grievance procedures set forth by their State legislatures. The cases were less about the Right to Petition than about its derivative Rights, the Right of free speech and association. Regardless, *Smith* and *Knight* were not cases, as here, involving private citizens petitioning the Government for violating restrictions

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[8] *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463 (1979), and *Minnesota State Bd. Community Colleges v. Knight*, 465 U.S. 217, 284 (1984).

[9] For a copy of the DC Circuit's Opinion please see App. D at A-4.

and prohibitions found in the Articles of the Constitution. For more analysis, see Part 4 below.

On the other hand, the Eighth Circuit Court merely held, without any explanation whatsoever, that "[Plaintiffs'] constitutional arguments are without merit."[10] Ostensibly, the Court held that the accountability clause of the First Amendment was intended to be without effect and the Government has no obligation under it. This is clearly erroneous. As Chief Justice Marshall said, "There is no provision of the Constitution that was intended to be without effect." *Marbury v. Madison*, 5 U.S. 139 (Cranch) 1803.

The Ninth Circuit, affirming the District Court, said simply, in referring to Plaintiff's constitutional arguments, "Schulz's remaining contentions are unpersuasive."[11] The District Court simply equated Plaintiffs' Right to Petition for Redress of Grievances claim to a Right to Associate claim, and then held that there is "no *First Amendment* [association] right in violating a constitutional statute."[12]

In what we submit to be error, the Ninth Circuit equated Plaintiff's Right to Petition to a Right to Associate, then compounded that error by converting plaintiff's exercise of the constitutional Right into the potential crime of promoting an abusive tax shelter. The District Court was referring of course, to Section 6700 and 6701 of the internal revenue laws, which penalize those who promote "abusive tax shelters."

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[10] For a copy of the 8th Circuit's Opinion please see App.G at A-26.
[11] For a copy of the 9th Circuit's Opinion please see App.H at A-28.
[12] For a copy of the Dist. Court's Opinion please see App.I at A-31.

The Second Circuit, relying on *U.S. v. Ramsey*, 992 F.2d 831,833 (8th Cir. 1993), quoting *U.S. v. Lee*, 455 U.S. 252, 260, held that there is "no First Amendment right to avoid federal income taxes on religious grounds." *Ramsey* and *Lee* were Free Exercise cases that did not involve a Petition for Redress of a violation by the Government of any Article of the Constitution or the refusal of the Government to justify and/or cease its unlawful behavior. While *Lee* and *Ramsey* ultimately stood for the proposition that the imposition of taxes did not substantively infringe the exercise of religion, the *Astrup* Court deprived Astrup of the Right to Redress to cure constitutional torts and the Right to Redress Before Taxes. The Second Circuit erred in deciding *Astrup*. *Ramsey* and *Lee* are distinguishable and not on point.

The Tenth Circuit decision actually helps Plaintiffs. It suggests the DC Circuit might have held differently had it considered Plaintiffs' argument that they are not public employees. The issue in *Van Deelen* was government retaliation against private Citizen Van Deelen for Petitioning the Government for Redress of Grievances. The County used the "public concern doctrine" in its defense. Unlike the DC Circuit in the instant case, however, the 10th Circuit recognized that the First Amendment Rights of private Citizens cannot be constrained in ways that are possible with public employees due to the public concern doctrine. The Tenth Circuit distinguished the First Amendment Rights of private persons from those of public employees acting in their official capacities (as in *Smith* and *Knight*). The Court held public employees who petition the

Government (as in *Smith* and *Knight*) do not have the same First Amendment Right to a response and to protection against retaliation as private persons due to the need to provide public services in as efficient a manner as possible. The Tenth Circuit addressed only part of the instant question – that is, the permissibility of retaliation against a private person who Petitions the government for Redress of Grievances. Although the Court was not directly presented with the larger questions of "Right to Response," and "Right to Redress before taxes," it is clear that whatever powers the Right to Petition may embody, the Court firmly ruled it prohibits retaliation against Citizens that Petition. In deciding, the Court recognized the significant difference in the constitutional Rights of private individuals acting under the Petition Clause as opposed to individuals acting in their public (i.e., governmental) capacities. Its decision therefore conflicts with the decision by the DC Circuit. **Importantly, this decision does not conflict with this Court's holdings in *Smith* and *Knight*.** The decision by the Tenth Circuit held in part, "A private citizen exercises a constitutionally protected First Amendment Right anytime he or she petitions the government for redress. The petitioning clause of the First Amendment does not pick and choose its causes. The minor and questionable, along with the mighty and consequential, are all embraced."

4. THE DC CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The DC Circuit Court's decision actually conflicts with this Court's decisions in *Smith* and *Knight, supra.*

Smith and *Knight* were cases involving job related grievances by public employees and grievance procedures set forth by their State legislatures. The cases were less about the Right to Petition than about its derivative Rights -- free speech and association. Regardless, *Smith* and *Knight* were not cases, as here, involving private citizens Petitioning the Government for violating constitutional prohibitions and limitations.

The DC Panel's application of the principles of law set down in *Smith* and *Knight* does not provide sufficient justification for the conclusion here that Government does not have an obligation to respond to private Plaintiffs' Petitions for Redress of constitutional torts.

Whatever effect the DC Court's decision may have in strengthening the application of *stare decisis*, it is likely to be far less important than what that Court has done in eroding the Constitution by sanctioning the Government's retaliation, under color of law, against the People who have, in good faith, claimed and exercised unalienable Rights guaranteed by the Constitution.

The instant decision's conflict with *Smith* and *Knight* is due to the DC Circuit Court's failure to recognize the overriding distinguishing factual issue in this case -- Plaintiffs' Grievances go directly to constitutional torts -- that is, violations of the

constitution (policies long ago set in stone by the Framers and Ratifiers, subject only to change by Constitutional Amendment) not, as in *Smith* and *Knight*, less significant government policy making by sitting state legislative and administrative boards.

The DC Court's decision in this case conflicts with *Smith* and *Knight* in that it is a watershed decision of far reaching importance, denying not only a Fundamental Right, but the "capstone Right" of all Persons (i.e., the procedural instrument for enforcing the rest of the Charter).

The constitutional principle declared in *Smith* and *Knight* merely governs the obligation of governments "to listen and respond" to public employees who do (*Smith*) or do not (*Knight*) want to submit employment related grievances to their state employers through a labor association as required by state legislation.

Notwithstanding *Smith* and *Knight*, the principle or rule of conduct governing Government's obligation to respond to Petitions to the federal Government by private Citizens, in their private capacities, for Redress of Grievances involving **constitutional torts, has yet to be declared by any Court**, much less "settled through iteration and reiteration over a long period."

The DC Circuit Court's decision also conflicts with *Clark v. Martinez*, 543 U.S. 371, quoting *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991), which stands for the proposition that in constitutional cases such as this, the Courts do not give as strong a *stare decisis* consideration to its

holdings as with cases dealing with an issue of statutory interpretation (as in *Smith* and *Knight*).

In the instant case, the facts, circumstances and legal arguments are so radically different that there is no risk of making *Smith* or *Knight* a legal anomaly.

Indeed, the Panel concluded its opinion in what we believe to be error, saying, "We need not resolve this [original intent] debate, however, because we must follow the binding Supreme Court precedent [in *Smith* and *Knight*]."

However, "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison*. 5 U.S. 139 (Cranch) (1803).

Finally, the DC Circuit Court decision conflicts with a long line of this Court's decisions that stand for the proposition that no Act of Congress (including the Internal Revenue Code) can trump the Constitution.

The DC Circuit Court decision held, in effect, that even if the Plaintiffs had a Right to hold the Government accountable to the Constitution (i.e., a Right to a response from the Government to their four Petitions for Redress of constitutional torts), the Plaintiffs could not expect the judicial department to assist the Plaintiffs if the Plaintiffs were: a) attacked by the Executive department for withdrawing their financial support until their Grievances were Redressed; and b), if, in reaction to the retaliation, the Plaintiffs were to approach the Judicial branch for an order blocking any further retaliatory actions

by the Executive until Plaintiffs' Grievances were Redressed.

The Circuit Court cited the Anti-Injunction Act as the reason for being barred from protecting the Plaintiffs from such retaliation because of the Act's provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

This implies that Acts of Congress can trump the Constitution and the Fundamental, Individual Rights it expressly protects.

From *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936):

> "And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance

> thereof; ... shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute [298 U.S. 238, 297], whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins v. Children's Hospital,* 261 U.S. 525, 544, 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 549, 550 S., 55 S.Ct. 837, 97 A.L.R. 947." *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936).

And from Hamilton, *Federalist No. 78*:

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master;

that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

The DC Court erred by failing to first consider the higher-order constitutional nature of the claim and exercise of the Right to Petition and its corollary Rights before invoking the Anti-Injunction Act.

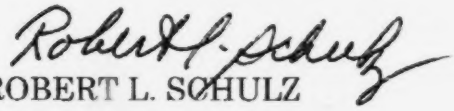
CONCLUSION

The First and Ninth Amendment guarantee the positive Rights discussed above.

Petitioning the government for Redress of Grievances is the only non-violent means the Plaintiffs possess to hold their government accountable to its primary role of protecting the People and their individual, unalienable Rights.

Plaintiffs urge this most Honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Dated: November 10, 2007



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Appendix A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5359 September Term, 2006
04cv01211
Filed On: August 3, 2007

We The People Foundation Inc., et al.,
Appellants

v.

United States of America, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentellle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
Michael C. McGrail
Deputy Clerk

*Circuit Judge Randolph did not participate in this matter.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5359 September Term, 2006
04cv01211
Filed On: May 11, 2007

We The People Foundation Inc., et al.,
Appellants

v.

United States of America, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Rogers, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for injunctive relief, the motion to expedite ruling, and the motion for post-argument communication, and in light of this court's May 8, 2007 opinion in this case, it is

ORDERED that the motions be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
Cheri Carter
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5359 September Term, 2006

04cv01211
Filed On: May 8, 2007

We The People Foundation Inc., et al.,
Appellants

v.

United States of America, et al.,
Appellees

ORDER

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 6, 2006 Decided May 8, 2007

No. 05-5359

WE THE PEOPLE FOUNDATION INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeal from the United States District Court
For the District of Columbia
(No. 04cv01211)

Mark Lane argued the cause for appellants. With him on the briefs was Robert L. Schulz, Pro se.

Carol Barthel, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Kenneth L. Wainstein, U.S. Attorney at the time the brief was filed, and Kenneth L. Greene, Attorney. Bruce R. Ellisen and Kenneth W. Rosenberg, Attorneys, entered appearances.

Before: GINSBURG, Chief Judge, and ROGERS and KAVANAUGH, Circuit Judges.

Appendix D

Opinion for the Court filed by Circuit Judge KAVANAUGH, in which Chief Judge GINSBURG and Circuit Judge ROGERS join.

Concurring opinion filed by Circuit Judge ROGERS.

KAVANAUGH, *Circuit Judge*: Ratified in 1791, the *First Amendment to the United States Constitution* provides in part that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Plaintiffs are citizens who petitioned various parts of the Legislative and Executive Branches for redress of a variety of grievances that plaintiffs asserted with respect to the Government's tax, privacy, and war policies. Alleging that they did not receive an adequate response, plaintiffs sued to compel a response from the Government.

Plaintiffs contend that the *First Amendment* guarantees a citizen's right to receive a government response to or official consideration of a petition for redress of grievances. Plaintiffs' argument fails because, as the Supreme Court has held, the *First Amendment* does not encompass such a right. *See Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 283, 285, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984); Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).*

I

Plaintiffs are numerous individuals and an organization that creatively calls itself "We the

People." For purposes of this appeal, we take the allegations in the complaint as true. According to plaintiffs, they have engaged since 1999 in "a nationwide effort to get the government to answer specific questions" regarding what plaintiffs view as the Government's "violation of the taxing clauses of the Constitution" and "violation of the war powers, money and 'privacy' clauses of the Constitution." Joint Appendix ("J.A.") 80 (Am. Compl. P 3). Plaintiffs submitted petitions with extensive lists of inquiries to various government agencies. On March 16, 2002, for example, plaintiffs submitted a petition with hundreds of inquiries regarding the tax code to a Member of Congress and to various parts of the Executive Branch, including the Department of Justice and the Department of the Treasury. On November 8, 2002, plaintiffs presented four petitions to each Member of Congress. Those petitions concerned the Government's war powers, privacy issues, the Federal Reserve System, and the tax code. On May 10, 2004, plaintiffs submitted a petition regarding similar issues to the Executive Branch, including the Department of Justice and the Department of the Treasury.

Plaintiffs contend that the Legislative and Executive Branches have responded to the petitions with "total silence and a lack of acknowledgment." J.A. 85 (Am. Compl. P 35). In protest, some plaintiffs have stopped paying federal income taxes.

Based on their view that the Government has not sufficiently responded to their petitions, plaintiffs filed suit in the United States District Court for the District of Columbia. They raised two claims. First, plaintiffs contend that the

Government violated their *First Amendment* right to petition the Government for a redress of grievances by failing to adequately respond to plaintiffs' petitions. In particular, plaintiffs contend that the President, the Attorney General, the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, and Congress neglected their responsibilities under the *First Amendment* to respond to plaintiffs' petitions. Plaintiffs want the Government to enter into "good faith exchanges" with plaintiffs and to provide "documented and specific answers" to the questions posed in the petitions. J.A. 78 (Am. Compl.). Second, plaintiffs claim that government officials by seeking to collect unpaid taxes have retaliated against plaintiffs' exercise of *First Amendment* rights. Plaintiffs therefore asked the District Court to enjoin the Internal Revenue Service, the Department of Justice, and other federal agencies from retaliating against plaintiffs' exercise of their constitutional rights (in other words, to prevent the Government from collecting taxes from them).

The Government has responded that the federal courts lack jurisdiction over either claim because the Government has not waived its sovereign immunity with respect to the causes of action asserted by plaintiffs. As to the Petition Clause claim, the Government has contended in the alternative that plaintiffs have failed to state a claim for which relief could be granted because the *Petition Clause* does not require the Government to respond to or officially consider petitions.

The District Court dismissed plaintiffs' complaint. *We the People v. United States, No. 04-cv-1211, 2005 U.S. Dist. LEXIS 20409, slip op. at 6*

(D.D.C. Aug. 31, 2005). The Court ruled that the *First Amendment* does not provide plaintiffs with the right to receive a government response to or official consideration of their petitions. *2005 U.S. Dist. LEXIS 20409, at 2-3.* In addition, the District Court concluded that the Anti-Injunction Act bars plaintiffs' claim for injunctive relief with respect to the collection of taxes. *See 2005 U.S. Dist. LEXIS 20409, at 5* (citing *26 U.S.C. § 7421*).

II

Plaintiffs raise two legal arguments on appeal. First, plaintiffs contend that they have a *First Amendment* right to receive a government response to or official consideration of their petitions. Second, plaintiffs argue that they have the right to withhold payment of their taxes until they receive adequate action on their petitions.

The Government renews its argument that plaintiffs' claims are barred by sovereign immunity. In response, plaintiffs have contended that *Section 702* of the Administrative Procedure Act waives the Government's sovereign immunity. That section provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . The United States may be named as a defendant in any such action . . . ." *5 U.S.C. § 702.* The Government acknowledges that *Section 702* waives sovereign immunity from suits for injunctive relief. *See Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260-61, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999)* (describing *Section 702* as waiving the Government's immunity from actions seeking relief other than money damages); *Trudeau v. FTC, 372*

U.S. App. D.C. 335, 456 F.3d 178, 186 (D.C. Cir. 2006) ("[T]here is no doubt that *§ 702* waives the Government's immunity from actions seeking relief other than money damages.") (internal quotation omitted). The Government contends, however, that plaintiffs' claims fall within an exception to *Section 702* that provides: "Nothing herein . . . affects other limitations on judicial review . . . ." *5 U.S.C. § 702.* The Government further argues that the Anti-Injunction Act presents just such a barrier to judicial relief in this case because of the Act's provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *26 U.S.C. § 7421(a).*

We agree with the Government that the Anti-Injunction Act precludes plaintiffs' second claim - related to collection of taxes. *See Bob Jones Univ. v. Simon, 416 U.S. 725, 726-27, 749-50, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974).* In asserting that claim, plaintiffs seek to restrain the Government's collection of taxes, which is precisely what the Anti-Injunction Act prohibits, notwithstanding that plaintiffs have couched their tax collection claim in constitutional terms. *See Alexander v. "Americans United", Inc., 416 U.S. 752, 759-60, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974).*

Plaintiffs also raise, however, a straight *First Amendment* Petition Clause claim-namely, that they have a right to receive a government response to or official consideration of their various petitions. By its terms, the Anti-Injunction Act does not bar that claim, and *Section 702* waives the Government's sovereign immunity from this suit for injunctive relief, at least with respect to

plaintiffs' allegations regarding actions of certain of the named defendants. *See 26 U.S.C. § 7421; cf. Trudeau, 456 F.3d at 187.* We therefore will consider that claim on the merits.

III

The *First Amendment to the Constitution* provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. CONST. amend. I.* Plaintiffs contend that they have a right under the *First Amendment* to receive a government response to or official consideration of a petition for a redress of grievances. We disagree.

In cases involving petitions to state agencies, the Supreme Court has held that the *Petition Clause* does not provide a right to a response or official consideration. In *Smith v. Arkansas State Highway Employees*, for example, state highway commission employees argued that a state agency violated the *First Amendment* by not responding to or considering grievances that employees submitted through their union. *See 441 U.S. 463, 463-64, 99 S. Ct. 1826, 60 L. Ed. 2d 360 & n.1 (1979).* In response, the Court held that "the *First Amendment* does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Id. at 465.*

Likewise, in *Minnesota State Board for Community Colleges v. Knight*, the Supreme Court evaluated a state law that required public

employers to discuss certain employee matters exclusively with a union representative; this prevented nonunion employees from discussing those matters with their employers. *465 U.S. 271, 273, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984).* Holding that the state statutory scheme had not "unconstitutionally denied an opportunity to participate in their public employer's making of policy," the Court reiterated: "Nothing in the *First Amendment* or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id. at 285, 292.* Therefore, the Court concluded that individuals "have no constitutional right as members of the public to a government audience for their policy views." *Id. at 286.* Plaintiffs contend that *Smith* and *Knight* do not govern their claims in this case because those cases addressed petitions to state officials regarding public policy, not claims that the Federal Government has violated the Constitution. Plaintiffs' attempted distinction is at best strained. In both cases, the Supreme Court flatly stated that the *First Amendment*, which has been incorporated against the States by the *Fourteenth Amendment*, does not provide a right to a response to or official consideration of a petition. *Knight, 465 U.S. at 285; Smith, 441 U.S. at 465.* Nothing in the two Supreme Court opinions hints at a limitation on their holdings to *certain* kinds of petitions or *certain* levels of Government. In short, the Supreme Court precedents in *Smith* and *Knight* govern this case.

IV

Appendix D

Plaintiffs cite the work of several commentators who suggest that *Smith* and *Knight* overlooked important historical information regarding the right to petition. Those commentators point to the government practice of considering petitions in some quasi-formal fashion from the 13th century in England through American colonial times - a practice that continued in the early years of the American Republic. Based on this historical practice, plaintiffs and these commentators contend that the *Petition Clause* should be interpreted to incorporate a right to a response to or official consideration of petitions. *See, e.g.*, Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances, 96 YALE L.J. 142, 155 (1986)*; James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 904-05* & n.22 (1997); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17-18 (1993); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, 106 HARV. L. REV. 1111, 1116-18 (1993)*; *cf.* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST REV. 113, 116-18, 141 (1991).

Other scholars disagree, arguing based on the plain text of the *First Amendment* that the "right to petition the government for a redress of grievances really is just a right to petition the government for a redress of grievances." Gary Lawson & Guy Seidman, *Downsizing the Right to*

Petition, 93 NW. U. L. REV. 739, 766 (1999); cf. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1190-91 (1986).* These scholars note that the *Petition Clause* by its terms refers only to a right "to petition"; it does not also refer to a right to response or official consideration. *See* N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (24th ed. 1782) ("To petition": "to present or put up a Petition"); S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("To petition": "To solicite; to supplicate"). As they suggest, moreover, the Framers and Ratifiers did not intend to incorporate every historical practice of British or colonial governments into the text of the Constitution. *See* Lawson & Seidman, *93 NW. U. L. REV. at 756-57; cf. Williams v. Florida, 399 U.S. 78, 92-93, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 274-76, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* ("Despite this recognition of civil exemplary damages as punitive in nature, the *Eighth Amendment* did not expressly include it within its scope.").

We need not resolve this debate, however, because we must follow the binding Supreme Court precedent. *See Tenet v. Doe, 544 U.S. 1, 10-11, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005).* And under that precedent, Executive and Legislative responses to and consideration of petitions are entrusted to the discretion of those Branches.

The judgment of the District Court is affirmed.

So ordered.

ROGERS, *Circuit Judge*, concurring: The text of the *Petition Clause of the First Amendment* does not explicitly indicate whether the right to petition includes a right to a response. [**14] Appellants ask the court to consider the text in light of historical evidence of how the right to petition was understood at the time the *First Amendment* was adopted. Essentially, they contend that the *Petition Clause* should be read in light of contemporary understanding, which they suggest indicates that the obligation to respond was part and parcel of the right to petition.

As the court points out, we have no occasion to resolve the merits of appellants' historical argument, given the binding Supreme Court precedent in *Smith v. Arkansas State Highway Employees, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979)*, and *Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984)*. Op. at 9. That precedent, however, does not refer to the historical evidence and we know from the briefs in *Knight* that the historical argument was not presented to the Supreme Court.

The Supreme Court's interpretation of the Constitution has been informed by the understanding that:

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a

dictionary, but by considering their origin and the line of their growth."

Konigsberg v. State Bar of California, 366 U.S. 36, 50 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961) (quoting *Gompers v. United States, 233 U.S. 604, 610, 34 S. Ct. 693, 58 L. Ed. 1115 (1914)).* Even where the plain text yields a clear interpretation, the Supreme Court has rejected a pure textualist approach in favor of an analysis that accords weight to the historical context and the underlying purpose of the clause at issue. For example, in *Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984),* the Supreme Court stated that "[t]he history may help explain why the Court consistently has declined to take a rigid, absolutist view of the *Establishment Clause.* We have refused 'to construe the *Religion Clauses* with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*'" *Id. at 678* (quoting *Walz v. Tax Comm'n, 397 U.S. 664, 671, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)); see id. at 673-75.* Nor is the Supreme Court's rejection of literalism limited to the *First Amendment.* [1]

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[1] For instance, in Eleventh Amendment cases, the Supreme Court has rejected "ahistorical literalism," Alden v. Maine, 527 U.S. 706, 730, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), and instead has turned to "history, practice, precedent, and the structure of the Constitution," id. at 741; see id. at 711-24, 730-35, 741-44, explaining that "[a]lthough the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms,'" id. at 729 (omission in original) (quoting *Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*

(quoting *Blatchford v. Native Village of Noatak, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)*); *see also Seminole Tribe, 517 U.S. at 69-70*; *Principality of Monaco v. Mississippi, 292 U.S. 313, 320-26, 330, 54 S. Ct. 745, 78 L. Ed. 1282 (1934)*; *Hans v. Louisiana, 134 U.S. 1, 10-11, 15, 10 S. Ct. 504, 33 L. Ed. 842 (1890)*. In construing the *Fifth Amendment* in *Ullmann v. United States, 350 U.S. 422, 424-25, 438-39, 76 S. Ct. 497, 100 L. Ed. 511 (1956)*, the Supreme Court rejected the contention that the privilege against self-incrimination protects an individual who is given immunity from prosecution from being forced to testify before a grand jury: For "the privilege against self-incrimination[,] . . . it is peculiarly true that 'a page of history is worth a volume of logic.' For the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is . . . with the danger to a witness forced to give testimony" that may lead to criminal charges. *Id. at 438-39* (internal quotation marks omitted) (citations omitted) (quoting *New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 65 L. Ed. 963, T.D. 3267 (1921)*). And in interpreting the *Ex Post Facto* Clause, the Supreme Court in *Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)*, relied on history rather than adopting a literal construction:

> Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. As early opinions in this Court explained, "*ex post facto* law" was a term of art with an established meaning at the time of the framing of the Constitution.

Id. at 41 (internal citations omitted) (citing *Calder v. Bull, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798)*); *see Minnesota v. Carter, 525 U.S. 83, 88-89, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)*; *Maryland v. Craig, 497*

In the context of the *First Amendment*, the Supreme Court has repeatedly emphasized the significance of historical evidence. A few examples suffice to illustrate the point. In *Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)*, the Supreme Court acknowledged that:

> [The] right of access to criminal trials [by the press] is not explicitly mentioned in terms in the *First Amendment*. But we have long eschewed any narrow, literal conception of the Amendment's terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The *First Amendment* is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other *First Amendment* rights.

Id. at 604 (internal quotations marks omitted) (citations omitted). In *Lynch v. Donnelly*, the Supreme Court acknowledged that its

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U.S. 836, 844-49, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502-03, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); Goldstein v. California, 412 U.S. 546, 561-62, 93 S. Ct. 2303, 37 L. Ed. 2d 163 (1973); Gravel v. United States, 408 U.S. 606, 616-18, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972); Wright v. United States, 302 U.S. 583, 607, 58 S. Ct. 395, 82 L. Ed. 439, 86 Ct. Cl. 764 (1938) (Stone, J., concurring); *Olmstead v. United States, 277 U.S. 438, 476-77, 48 S. Ct. 564, 72 L. Ed. 944 (1928)* (Brandeis, J., dissenting); *Boyd v. United States, 116 U.S. 616, 634-35, 6 S. Ct. 524, 29 L. Ed. 746 (1886).*

"interpretation of the *Establishment Clause* has comported with what history reveals was the contemporaneous understanding of its guarantees." *465 U.S. at 673; see id. at 673-77.* In *Marsh v. Chambers, 463 U.S. 783, 786-94, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983)*, the Supreme Court looked to contemporary practice from the early sessions of Congress and to later congressional practice in holding that paid legislative chaplains and opening prayers do not violate the *First Amendment. See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583-85, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); Engel v. Vitale, 370 U.S. 421, 425-33, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962); Everson v. Bd. of Educ., 330 U.S. 1, 7-15, 67 S. Ct. 504, 91 L. Ed. 711 (1947); Grosjean v. Am. Press Co., 297 U.S. 233, 240, 245-49, 56 S. Ct. 444, 80 L. Ed. 660 (1936); Near v. Minnesota, 283 U.S. 697, 713-18, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).*[2]

Appellants point to the long history of petitioning and the importance of the practice in England, the American Colonies, and the United States until the 1830's as suggesting that the right to petition was commonly understood at the time the *First Amendment* was proposed and ratified to include duties of consideration and response. *See*

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[2] Similar analysis is found in the Supreme Court's interpretation of other provisions of the Constitution. *See Crawford v. Washington, 541 U.S. 36, 42-50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)* (*Sixth Amendment*); *Atwater v. City of Lago Vista, 532 U.S. 318, 326-40, 345 n.14, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)* (*Fourth Amendment*); *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 782-83, 800-15, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995)* (*Tenth Amendment*); *Harmelin v. Michigan, 501 U.S. 957, 975-85, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)* (*Eighth Amendment*); *Wesberry v. Sanders, 376 U.S. 1, 2-3, 7-17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964)* (Art. I, § 2).

Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22-33 (1993); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1154-68, 1170-75 (1986).* Based on the historical background of the *Petition Clause*, "most scholars agree that the right to petition includes a right to some sort of considered response." James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 905 n.22 (1997); see* David C. Frederick, *John Quincy Adams, Slavery, and the Right of Petition*, 9 LAW & HIST. L. REV. 113, 141 (1991) ; Spanbauer, *supra*, at 40-42; Stephen A. Higginson, Note, *A Short History of the Right to Petition, 96 YALE L.J. 142, 155-56 (1986);* Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, 106 HARV. L. REV. 1111, 1116-17, 1119-20 (1993); see also* Akhil Reed Amar, *The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1156 (1991)* (lending credence to Higginson's argument that the *Petition Clause* implies a duty to respond). Even those who take a different view, based on a redefinition of the question and differences between English and American governments, acknowledge that there is "an emerging consensus of scholars" embracing appellants' interpretation of the right to petition. *See* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition, 93 NW. U. L. REV. 739, 756 (1999).*

The sources cited by appellants indicate that "[t]he debates over the inclusion of the right to petition reveal very little about why the convention delegates may have regarded the right as important or what the 'framers' intended with respect to the substantive meaning of the right." Frederick, *supra*, at 117 n.19 (citing 4 BERNARD SCHWARTZ, THE ROOTS OF THE *BILL OF RIGHTS* 762-66, 840-42 (1980)); *see Higginson, supra, at 155-56.* But neither textual omission [3] nor the absence of explicit statements by Framers or Ratifiers on the precise issue has been dispositive in the Supreme Court's *First Amendment* jurisprudence. Instead, the historical context and the underlying purpose have been the hallmarks of the Supreme Court's approach to the *First Amendment. See, e.g., Buckley v. Valeo, 424 U.S. 1, 14-15, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 269-71, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); Roth v. United States, 354 U.S. 476, 481-84, 488, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); Beauharnais v.*

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[3] *See, e.g., Globe Newspaper, 457 U.S. at 604.* The Supreme Court has adopted the same approach in interpreting other provisions of the Constitution. For example, in holding that the *Speech or Debate Clause* applies to a Senator's aide even though it mentions only "Senators and Representatives," the Supreme Court in *Gravel* observed that although the Clause "speaks only of 'Speech or Debate,'" its precedent, consistent with adhering to the underlying purpose of the Clause, "ha[d] plainly not taken a literalistic approach in applying the privilege" to protect committee reports, resolutions, and voting. *Gravel, 408 U.S. at 617; see id. at 616-18.* In the *Fourth Amendment* context, although the Amendment speaks only to protecting people in their houses, the Supreme Court in *Carter* noted that its precedent, in some situations, had extended that protection to apply to individuals' privacy in other people's houses. *Carter, 525 U.S. at 88-89; see also Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 & n.15, (1975); Goldstein, 412 U.S. at 561-62; Principality of Monaco, 292 U.S. at 320-23, 330; Hans, 134 U.S. at 10-11, 15.*

Illinois, 343 U.S. 250, 254-55, 72 S. Ct. 725, 96 L. Ed. 919 (1952).

The Supreme Court's free speech precedent is illustrative. Although the textual meaning of "speech" is as clear, in terms of dictionary definitions, as the meaning of "petition," the Supreme Court has interpreted "speech" broadly in order to protect freedom of expression:

> The *First Amendment* literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word . . . . [W]e have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the *First* and *Fourteenth Amendments*."

Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (quoting *Spence v. Washington, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974)*); *cf. NAACP v. Button, 371 U.S. 415, 430, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).* The text of the *First Amendment* mentions neither writing nor conduct, and at the time of the Founding, as now, the word "speech" meant expression through "vocal words."[4] Yet the

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[4] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("speech": "The power of articulate utterance; the power of expressing thoughts by vocal words," "Language; words considered as expressing thoughts," "Particular language; as distinct from others," "Any thing spoken," "Talk; mention," "Oration, harangue," "Declaration of thoughts"); 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1790) ("speech": "The power of articulate utterance, the power of expressing thoughts by vocal words; language,

Supreme Court has considered both the history and purpose of the *First Amendment* in according a broad interpretation to the *Free Speech Clause.* Looking, in part, to the Framers' intent, the Supreme Court has held that the *Free Speech Clause* applies to written communications, *see City of Ladue v. Gilleo, 512 U.S. 43, 45, 58, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983); Martin v. Struthers, 319 U.S. 141, 141-42, 149, 63 S. Ct. 862, 87 L. Ed. 1313 (1943),* as well as a broad range of expressive activities, including spending to promote a cause, *First Nat'l Bank v. Bellotti, 435 U.S. 765, 767, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); Buckley, 424 U.S. at 19-20,* burning the American flag, *see Johnson, 491 U.S. at 399-400, 404-06,* and dancing nude, *see City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).* Furthermore, although

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words considered as expressing thoughts; particular language as distinct from others; any thing spoken; talk, mention; oration, harangue"); *see* NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (24th ed. 1782) ("speech": "Language, Discourse"); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1731 (3d ed. 1992) ("speech": "The faculty or act of speaking," "The faculty or act of expressing or describing thoughts, feelings, or perceptions by the articulation of words," "Something spoken; an utterance," "Vocal communication; conversation"); THE NEW OXFORD AMERICAN DICTIONARY 1630 (2d ed. 2005) ("speech": "the expression of or the ability to express thoughts and feelings by articulate sounds"); 16 THE OXFORD ENGLISH DICTIONARY 175-77 (2d ed. 1989) ("speech": "The act of speaking; the natural exercise of the vocal organs; the utterance of words or sentences; oral expression of thought or feeling").

the dictionaries do not exclude any particular types of oral communication from the definition of "speech," the Supreme Court has held, in light of the historical context, that the *First Amendment* does not protect obscene speech, *Roth, 354 U.S. at 481-85, 488; Miller v. California, 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*, libelous speech, *Beauharnais, 343 U.S. at 254-55, 266*, false commercial speech, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)*, or speech that is "likely to cause a breach of the peace," *Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)*.

Of course, this court cannot know whether the traditional historical analysis would have resonance with the Supreme Court in a Petition Clause claim such as appellants have brought. It remains to be seen whether the Supreme Court would agree to entertain the issue, much less whether it would agree with appellants and "most scholars" that the historical evidence provides insight into the First Congress's understanding of what was meant by the right to petition and reevaluate its precedent, or conversely reject that analysis in light of other considerations, such as the nature of our constitutional government. No doubt it would present an interesting question. For now it suffices to observe that appellants' emphasis on contemporary historical understanding and practices is consistent with the Supreme Court's traditional interpretative approach to the *First Amendment*.

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WE THE PEOPLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 04-1211
	)	(EGS)
UNITED STATES, et al.,	)	
	)	
Defendants.	)	
	)	

OPINION & ORDER

Plaintiff We the People Foundation for Constitutional Education, Inc. and several individually -- named plaintiffs, including *pro se* plaintiff Robert L. Schultz, bring this action against the United States of America, the U.S. Treasury Department, the Internal Revenue Service, and the U.S. Department of Justice. Plaintiffs' Complaint "arises from the failure of the President of the United States and his Attorney General and his Secretary of the Treasury and his Commissioner of the Internal Revenue Service, and the failure of the United States Congress, to properly respond to Plaintiffs' Petitions for Redress of Grievances against their government, namely: grievances relating to violations of the U.S. Constitution's war powers, taxing, money, and "privacy" clauses." See Plaintiffs' Amended Complaint ("Compl.") at 66. Plaintiffs also allege that the Executive Branch has

retaliated against plaintiffs for petitioning the government and for "Peaceably Assembling and Associating with other individuals under the umbrella of the We the People Foundation for Constitutional Education and the We the People Congress." Id.

Pending before the Court are defendants' Motion to Dismiss and plaintiffs' Motion to Amend the Complaint. Upon consideration of the motions, the oppositions thereto, and the replies in support thereof, and for the following reasons, it is hereby

ORDERED that the defendants' Motion to Dismiss is **GRANTED**. It is further

ORDERED that the plaintiffs' Motion for Leave to File Amended Complaint is **DENIED**.

I. Motion to Dismiss

A. Standard of Review

A motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)* should be granted when it appears "beyond doubt" that there is no set of facts that plaintiffs can prove that will entitle them to relief. *See Sparrow v. United Air Lines, Inc., 342 U.S. App. D.C. 268, 216 F.3d 1111, 1114 (D.C. Cir. 2000).* "Accordingly, at this stage in the proceedings, the Court must accept as true all of the complaint's factual allegations." *Johnson v. District of Columbia, 190 F. Supp. 2d 34, 39 (D.D.C. 2002).*

B. Discussion

The *First Amendment* provides that "Congress shall make no law . . . abridging . . . the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. Const. Amend. I.* Plaintiffs contend that they therefore have a constitutional right to a response to the petitions they have filed with the various defendants, and that defendants have committed constitutional torts against plaintiffs in failing to respond to their petitions. See Pl. Opposition to Def. Motion to Dismiss ("Pl. Opp.") at 9-10. The Supreme Court, however, has held that "the *First Amendment* does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *See Smith v. Ark. State Highway Employees, Local 1315, 441 U.S. 463, 465, 60 L. Ed. 2d 360, 99 S. Ct. 1826 (1979).* Plaintiffs' claims that the defendants are obligated to "properly" respond to plaintiffs' petitions shall thus be dismissed for failure to state a claim upon which relief may be granted.

Plaintiffs' claims based on the "retaliatory actions" the defendants have allegedly taken against plaintiffs for exercising their *First Amendment* rights are similarly flawed. The governmental actions plaintiffs complain of include sending plaintiffs threatening letters, placing liens on their property, raiding plaintiffs' homes or offices, and forcing plaintiffs to appear before administrative or other tribunals. Compl. at P 48. It appears that because plaintiffs have not received responses to their petitions, they have "decided to give further expression to their Rights under the *First Amendment* to Speech, Assembly and Petition, by not withholding and turning over to government direct, un-apportioned taxes on Plaintiffs' labor -- money earned in direct exchange

for their labor (not to be confused with money "derived from" labor)." Pl. Opp. at 30-31.

Congress has provided methods for challenging the legality of such enforcement actions and to prevent governmental abuse. For example, taxpayers have the right to notice and a hearing before the federal government can file a notice of a tax lien or levy. *26 U.S.C. §§ 6320, 6330.* Citizens have a right of action for wrongful levies or other collection actions and for wrongful failure to release liens. Id. at *§§ 7426(a).* And taxpayers may sue to recover money erroneously or illegally assessed or collected by the government. Id. at *§ 7422(a).*

Plaintiffs do not, however, have a *First Amendment* right to withhold money owed to the government and to avoid governmental enforcement actions because they object to government policy. *See, e.g., Adams v. Comm'r, 170 F.3d 173, 182 (3d Cir. 1999)* ("Plaintiffs engaging in civil disobedience through tax protests must pay the penalties incurred as a result of engaging in such disobedience."); *United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir. 1990)* ("The consensus of this and every other circuit is that liability for a false or fraudulent return cannot be avoided by evoking the *First Amendment*[.]") (citing cases); *United States v. Kelley, 864 F.2d 569, 576-77 (7th Cir.), cert. denied, 493 U.S. 811, 107 L. Ed. 2d 23, 110 S. Ct. 55 (1989)* (actions that constitute more than mere advocacy not protected by the *First Amendment*); *Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985)* ("Noncompliance with the federal tax laws is conduct that is afforded no protection under the *First Amendment*[.]"); *United States v. Ness, 652 F.2d 890, 892 (9th Cir.),* cert.

denied, *454 U.S. 1126, 71 L. Ed. 2d 113, 102 S. Ct. 976 (1981)*("Tax violations are not a protected form of political dissent."); *United States v. Malinowski, 472 F.2d 850, 857 (3d Cir. 1973)* ("To urge that violating a federal law which has a direct or indirect bearing on the object of protest is conduct protected by the *First Amendment* is to endorse a concept having no precedent in any form of organized society where standards of societal conduct are promulgated by some authority.").

Moreover, the injunctive relief that plaintiffs seek, that is, "a temporary injunction against the United States Internal Revenue Service and the Department of Justice and any other agency of the United States that arguably may act in this matter under color of law, from taking any further retaliatory actions against the named plaintiffs in this proceeding," is clearly barred by the Anti-Injunction Act, *26 U.S.C. § 7421. See, e.g., Foodservice & Lodging Institute, Inc. v. Regan, 258 U.S. App. D.C. 1, 809 F.2d 842, 844 (D.C. Cir. 1987)*("The Anti-Injunction Act provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.' *26 U.S.C. § 7421(a)(1982).* The Declaratory Judgement Act provides that in a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.' *28 U.S.C. § 2201(a) (Supp. III 1985).* By their terms, these statutes clearly bar the appellant's claims for injunctive and declaratory relief as to the [challenged IRS regulations].").

For the above cited reasons, plaintiffs' complaint must be dismissed for failure to state a claim, pursuant to *Fed. R. Civ. P. 12(b) (6).*

I. Motion for Leave to File Amended Complaint

In light of the preceding discussion and the Court's ruling granting the defendants' motion to dismiss the complaint, plaintiffs' motion for leave to amend their complaint to add additional defendants, including the President of the United States, the United States Congress, the Commissioner of the Internal Revenue Service and others, as well as adding 1,600 plaintiffs, shall be **DENIED** as futile. *See James Madison Ltd. v. Ludwig, 317 U.S. App. D.C. 281, 82 F.3d 1085, 1099* ("Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss.")(citations omitted); *see also Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ., 263 F. Supp. 2d 82, 103-04 (2003), aff'd, 361 U.S. App. D.C. 257, 366 F.3d 930 (D.C. Cir. 2004), cert. denied, 162 L. Ed. 2d 274, 125 S. Ct. 2537 (2005)*(citing and discussing cases supporting a district court's discretion pursuant to *Fed. R. Civ. P. 15 (a)* to deny a motion for leave to amend complaint on the grounds of futility).

II. Conclusion

For the reasons set forth herein, it is hereby **ORDERED** that the defendants' motion to dismiss the complaint is **GRANTED** and plaintiffs' motion for leave to amend their complaint is **DENIED**. An

appropriate order accompanies this Opinion & Order.

Signed: EMMET G. SULLIVAN

U.S. District Judge

August 31, 2005

Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WE THE PEOPLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vi.	)	Civil Action No. 04-1211
	)	(EGS)
UNITED STATES, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Pursuant to *Federal Rule of Civil Procedure 58* and for the reasons stated by the Court in its Opinion & Order docketed this same day, it is this 31st day of August, 2005, hereby

ORDERED that the defendants' Motion to Dismiss is GRANTED; and it is further

ORDERED that the plaintiffs' Motion for Leave to Amend their Complaint is DENIED as futile; and it is further

ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of defendants and shall remove this case from the active calendar of the Court.

Signed: EMMET G. SULLIVAN

U.S. District Judge
August 31, 2005

Appendix G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06-2891

Robert L. Schulz	*	
	*	
Appellant,	*	
	*	Appeal from the United
	*	States District Court for
	*	The District of Nebraska.
v.	*	
	*	
United States; Internal	*	
Revenue	*	
Service, Terry Cox,	*	[UNPUBLISHED]
	*	
Appellees.	*	

Submitted: September 4, 2007
Filed: September 13, 2007

Before WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

PER CURIAM.

Robert Schulz appeals the district court's[1] order declining to quash a third-party summons issued to PayPal by the Internal Revenue Service (IRS). We affirm.

The district court determined that the IRS issued the summons within its authority under *26 U.S.C. § 7602*, as interpreted in *United States v. Powell, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964)*. According to *Powell*, to obtain enforcement of summons, the IRS "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the [Internal Revenue] Code have been followed." *Id.* A court, however, "may not permit its process to be abused," and "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.* We conclude that the district court did not clearly err in its determinations under *Powell*, and that Schulz did not meet his burden to show that the IRS abused the summons process or lacked good faith. *See United States v. Norwood, 420 F.3d 888, 892 (8th Cir. 2005); United States v. Dynavac, Inc., 6 F.3d 1407, 1414 (9th Cir. 1993)*.

We also hold that the district court did not abuse its discretion in denying Schulz's request for an evidentiary hearing. *See United States v. Nat'l*

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

Bank of S.D., 622 F.2d 365, 367 (8th Cir. 1980) (per curiam). A district court has discretionary authority to deny a hearing in summons enforcement proceeding, and an evidentiary hearing is necessary only where substantial deficiencies in summons proceedings are raised by party challenging summons. *Id.*

Finally, we conclude that Schulz's constitutional arguments challenging the IRS's authority to enforce the tax laws are without merit.

Accordingly, the judgment is affirmed. *See 8th Cir. R. 47B.*

Appendix H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT L. SCHULZ,	No. 05-17388
Plaintiff – Appellant,	DC # CV-05-80184 -RMW
v.	
UNITED STATES, ETAL	MEMORANDUM**
Defendant-Appellee.	

Appeal from the United States District Court
For the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 16, 2007***

Before: GRABER, CLIFTON, and BEA, Circuit Judges.

Robert L. Schulz appeals pro se from the district court's order denying his petition to quash a third party summons directed at PayPal in connection with an investigation of Schulz's internet tax evasion scheme. We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court's decision to enforce an IRS summons will not be

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

disturbed unless its finding that the summonses were issued for a proper purpose was clearly erroneous. *Ponsford v. United States,* 771 F.2d 1305, 1307 (9th Cir. 1985). The district court's denial of a motion to reconsider is reviewed for abuse of discretion. *Sch. Dist. No. IJ, Multnomah County, Or. V. AcandS, Inc.* 5 F.3d 1255, 1262 (9th Cir. 1993). We affirm.

The district court's determination upholding the summons was not clearly erroneous. The IRS submitted a declaration establishing a prima facie case that the summons was issued in good faith as part of a legitimate investigation concerning Schulz's tax liabilities and his role in assisting others in evading federal income tax laws. *See Fortney v. Unites States*, 59 F.3d 117, 119-20 (9th Cir. 1995). The district court did not err in finding that Schulz failed to meet his burden of proving that the investigation was motivated by bad faith. *See id.* At 120 ("Once a prima facie case is made a heavy burden is placed on the taxpayer to show an abuse of process or the lack of institutional good faith.") (internal quotations omitted).

The district court did not abuse its discretion by denying Schulz' motion for reconsideration because he re-argued issues already raised and rejected and did not establish any grounds for relief. *See AcandS, Inc.*, 5 F.3dat 1263.

Schulz's remaining contentions are unpersuasive.

AFFIRMED.

FILED
APRIL 27, 2007
Cathy A. Catterson, Clerk
U.S. Court f Appeals

Appendix I

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT L. SCHULZ

Plaintiff,

v.

UNITED STATES, INTERNAL REVENUE SERVICE, and ANTHONY ROUNDTREE,

Defendants.

No. C-05-MC-80184 RMW

ORDER DENYING PLAINTIFF'S REQUEST FOR RECONSIDERATION OF ORDER OVERRULING OBJECTIONS TO MAGISTRATE JUDGE'S ORDER DENYING MOTION TO QUASH I.R.S. SUMMONS

Robert L. Schulz moves for reconsideration of this court's October 31, 2005, order, which affirmed the September 26, 2005, order of Magistrate Judge Richard Seeborg refusing to quash a summons issued by the Internal Revenue Service to PayPal, Inc. For the reasons given below, the court affirms its previous order.

III. BACKGROUND

Schulz is the chairman of a foundation entitled "We The People," an organization which proclaims that it is devoted to the protection of Americans' constitutional rights. The Internal Revenue Service is investigating whether Schulz's activities constitute promoting a fraudulent tax scheme. Schulz has allegedly not provided certain records to the IRS, and the IRS is attempting to obtain these records from PayPay, Inc., which handles certain financial transactions between Schulz and those who obtain his publications.

The IRS issued a summons to PayPay, and Schulz moved to quash that summons. Magistrate Judge Richard Seeborg issued an order denying Schulz's motion to quash. Schulz objected under FRCivP 72(b) and sought review before a district court judge. [1] This court affirmed Judge Seeborg's order in all material aspects on October 31, 2005. Schulz now seeks reconsideration of that order. [2]

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[1] *FRCivP 72(b)* deals with objections to dispositive orders of magistrate judges. Schulz began action in the Northern District of California to quash the IRS summons to PayPal, and the government did not challenge Schulz's characterization of his objection. The court accepted Schulz's characterization of the objection and reviewed Schulz's objection on the record that was before Magistrate Judge Seeborg, pursuant to Civil L.R. 72-3(c). *See also 28 U.S.C. § 636(b)(1).*

[2] Schulz also requests leave to file a brief longer than twenty-five pages. His proposed motion for reconsideration is thirty-six pages. The court has reluctantly considered Schulz's lengthy motion for reconsideration.

II. ANALYSIS

Schulz's proposed motion for reconsideration raises no legal arguments that were not raised in his initial objections to Judge Seeborg's order, though he does refer to factual matters not mentioned earlier. Both of Schulz's motions are organized into eleven objections, and the court will address them in that order. The court will deny Schulz's motion for reconsideration, though it will expand on its reasons for overruling his objections.

First objection

Schulz objected that "[t]he Magistrate erred in broadening the IRS Summons issued to PayPal." Objection at 1. The government admitted that "the magistrate judge arguably used language that is broader than that contained in the summons." Opp'n at 2. While Magistrate Judge Seeborg's description of the scope of the IRS summons is indeed broader in the order at issue than the actual scope of the summons itself, the magistrate judge's order did not modify the summons. The summons goes to PayPal without any gloss from the magistrate judge's order. Schulz's first objection thus was not grounds for modification of the magistrate judge's order.

Second objection

Schulz contended that Magistrate Judge Seeborg erred in not holding an evidentiary hearing and not considering his voluminous exhibits in support of his motion. Schulz seemed to argue that if one considers his wide-ranging campaign to invalidate the federal income tax scheme on constitutional grounds, one must thereafter conclude that any IRS action against him is a

purely malicious counterstrike. This court refuses to follow such logic.

While Schulz's court challenges to IRS authority certainly could lead to malicious action by the IRS against him, the IRS made a sufficient showing under *United State v. Powell, 379 U.S. 48, 57-58 (1964)*, to obtain the information it seeks from PayPal. The magistrate judge noted that the IRS was investigating Schulz for what it termed "promoting an abusive tax scheme and aiding and abetting tax understatements." Under *I.R.C. § 6700(a)*, "[a]ny person who . . . organizes . . . any . . . plan or arrangement . . . and . . . causes another person to make or furnish (in connection with such organization or sale) . . . a statement with respect to . . . the excludability of any income . . . shall pay . . . a penalty," while under *I.R.C. § 6701(a)*,

> any person . . . who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document . . . who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and . . . who knows that such portion (if so used) would result in an understatement of the liability for tax of another person, shall pay a penalty.

Schulz admited that documents on websites of organizations he is affiliated with are directed toward the goal of ending "the practice of wage withholding by companies." The court notes,

without deciding, that assisting a company in avoiding wage withholding is arguably within the ambit of activities prohibited by *I.R.C. § 6701(a)* as aiding "in an understatement of the liability for tax of another person."

Powell allows the IRS to show "good faith" by demonstrating that the information it seeks is relevant to a legitimate purpose, if the IRS does not already posses the information and follows the required administrative steps. *379 U.S. at 57-58.* While Schulz has made a great deal of information publicly available, nothing in his exhibits indicates who has purchased certain of his tax-preparation products. Schulz did not challenge the IRS's adherence to proper administrative procedure. Until Schulz succeeds in his campaign against the IRS, investigation of violations of *I.R.C. § 6701(a)* is a proper purpose to issue a summons. The summons satisfies *Powell*

While Schulz correctly characterizes *I.R.C. § 6700-01* as "penalty statutes," he is incorrect that due process requires a full adversarial hearing at this preliminary, investigatory step. *See Powell, 379 U.S. at 56-59.* The government does not seek to enforce a penalty against him at this stage; any penalty is a mere possibility at this point, and any future penalty against Schulz will necessarily be proceeded by the adversarial proceeding he desires.

There was sufficient evidence for the magistrate judge to determine the IRS had met the requirements of *Powell.* While Schulz's evidence showed the extent of his tax-related activities, nothing he produced demonstrated that the IRS lacked a sufficient basis to investigate possible

violations of the Internal Revenue Code. There was thus no need for oral argument.

Schulz also claimed that "[t]he Magistrate's Order erred in its failure to address Plaintiff's that the IRS lacked jurisdiction over Schulz, in light of *Article I, Section 8, Clause 17 of the Constitution.*" Objection at 6. legislative authority over federal lands, such as the District of Columbia and military bases. Even if Schulz had not voluntarily submitted himself to the jurisdiction of this court by initiating an action here, the clause Schulz refers to cannot be read to limit this court's jurisdiction over him.

Schulz's second objection was not grounds for modification of the magistrate judge's order.

Third objection

Schulz's third objection repeated the alleged jurisdictional defects of his second objection and thus was not grounds for modification of the magistrate judge's order.

Fourth objection

Schulz's fourth objection seems to be that a pair of related decisions of the Second Circuit, *Schulz v. Internal Revenue Service, 395 F.3d 463 (January 25, 2005)*, and *Schulz v. Internal Revenue Service ("Schulz II"), 413 F.3d 297 (June 29, 2005)*, require a "full adversarial proceeding, *complete with an evidentiary hearing* . . . to determine the legitimacy of IRS's summons." Objection at 8. In the second of these Second Circuit cases, the court summarized its opinion as holding

> that: 1) absent an effort to seek enforcement through a federal court, IRS summonses "to appear, to testify, or to produce books, papers, records, or other data," *26 U.S.C. § 7604*, issued "under the internal revenue laws," *id.*, apply no force to the target, and no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order; 2) if the IRS seeks enforcement of a summons through the federal courts, those subject to the proposed order must be given a reasonable opportunity to contest the government's request; 3) if a federal court grants a government request for an order of enforcement then any individual subject to that order must be given a reasonable opportunity to comply and cannot be held in contempt or subjected to indictment under *26 U.S.C. § 7210* for refusing to comply with the original, unenforced IRS summons, no matter the taxpayer's reasons or lack of reasons for so refusing.

Schulz II, 413 F.3d at 298-99. Schulz reads too much into *Schulz II*; he seems to believe he is entitled to a something akin to a criminal trial in his attempt to quash the PayPal summons. He is not.

The Supreme Court in *Powell* set the balance between protection of individual rights and the

necessities of government, *see 379 U.S. at 57-58*, and nothing in the magistrate's order provided Schulz with less protection than he would be entitled to under *Powell* or *Schulz II*. Schulz will not be subjected to any penalty by the IRS summoning PayPal; any IRS action to attempt to penalize Schulz is only a possibility at this point. Schulz's fourth objection was not grounds for modification of the magistrate judge's order.

Fifth objection

Schulz complained that the magistrate's order characterizes Schulz's attempt to quash the summons to PayPay as an attempt to "protect the identity of customers who have purchased items from Schulz.'" Objection at 9 (quoting magistrate's order). Schulz aruged that he has no customers because he gives most of his products away for free. *Id.* at 9-10. The magistrate's order does not turn on fine semantic distinctions, and the summons itself does not refer to customers. *See* Affidavit # 1 in Support of Motion to Quash IRS Summons, Ex. A. The IRS seeks documents "related to obtaining, purchasing, and/or offering for purchase" two specific items Schulz publishes and any transaction for "$ 39.95, or any multiples thereof." *Id.* Whether third parties who engaged in such PayPal transactions are customers, friends, or supporters Schulz is not relevant to the propriety of the summons; substituting "people who gave Schulz money" for "customers" in the magistrate judge's order would overcome this objection but not alter the substance of the order.

Schulz also objected that the summons infringes upon several of his *First Amendment* rights:

"Privacy, Associational, Free Speech, and Petition for the Redress Rights." Objection at 10. The documents sought by the IRS are potentially related to violations of *I.R.C. § 6701(a)*, as discussed in the section on Schulz's second objection. The IRS has tailored its request to two publications and multiples of one sum of money.

Schulz did not demonstrate how the summons would have any concrete impact on his *First Amendment* rights. This court assumes, for the sake of argument, that the IRS summons will decrease the chances of people in the future seeking the two publications at issue or engaging in PayPal transactions with Schulz for any multiple of $ 39.95. This, however, does not appear to this court to be the sort of associational right protected by the *First Amendment*. The common thread linking the documents the IRS seeks is not mere association with Schulz, but certain publications that the IRS alleges are related to violations by Schulz of *I.R.C. § 6701(a)*. Schulz has no *First Amendment* right in violating a constitutional statute. Schulz's fifth objection was not grounds for modification of the magistrate judge's order.

Sixth objection

Schulz's sixth objection is essentially a restatement of parts of his second objection.

Seventh objection

The information the IRS seeks, the records of which customers engaged in certain transactions with Schulz, is not available in the large number of exhibits. Contrary to Schulz's argument, the IRS is entitled to this information.

Eighth, Ninth, Tenth, and Eleventh objections

Schulz's eighth, ninth, tenth, and eleventh objections are essentially restatements of his fourth objection, and were not grounds for modifying the magistrate judge's order for the reasons given in the section on his fourth objection.

III. ORDER

For the foregoing reasons, the court denies Schulz's request to reconsider its order overruling his objections to the magistrate judge's order.

DATED: November 21, 2005

RONALD M. WHYTE

United States District Judge

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 14th day of June, Two thousand and six.

PRESENT:

HON. CHESTER J. STRAUB,
HON. SONIA SOTOMAYOR,
HON. PETER W. HALL,
Circuit Judges.

. X

UNITED STATES OF AMERICA,

Petitioner-Appellee,

-v.- No. 05-5701-cv

PAUL ASTRUP,

Respondent-Appellant.

. X

APPEARING FOR APPELLANT: Paul Astrup, pro se, East Quogue, New York.

APPEARING FOR APPELLEE: Eileen J. O'Connor, Assistant Attorney General, United States Department of Justice, (Robert W. Metzler and Randolph L. Hutter, Attorneys, Tax Division, *on the brief*; Roslynn R. Mauskopf, *of counsel*).

Appeal from a decision of the United States District Court for the Eastern District of New York (Arthur Donald Spatt, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the district court is AFFIRMED.

Appellant Paul Astrup, *pro se*, appeals from an order of the United States District Court for the Eastern District of New York (Arthur Donald Spatt, *Judge*), granting the petition of the

government to enforce an Internal Revenue Service (IRS) summons. Astrup argues that we should vacate the decision below because (1) the government failed to meet the standard for enforcement set forth in *United States v. Powell,* 379 U.S. 48(1964); (2) the District Court violated his due process rights by not affording him a full evidentiary hearing on the merits of whether the summons should be enforced; (3) the IRS failed to take all necessary administrative steps before filing its Notice of Levy on Astrup's bank and employer; (4) the summons violated his First Amendment right to petition the government for a redress of grievances; and (5) that the IRS lacked territorial jurisdiction over him as a resident of East Quogue, N.Y. We assume familiarity with the facts, the procedural history, and the specification of appellate issues and affirm the decision of the District Court.

The IRS may issue summonses to ascertain the liability "of any person for any internal revenue tax, or collecting any such liability" and to "examine any books, papers, records, or other data which may be relevant or material to such inquiry." 26 U.S.C. § 7602(a)(1). IRS summonses, however, have no force or effect under the law unless the government establishes their validity through a 26 U.S.C. § 7604 proceeding. *See Schulz v. IRS,* 395 F.3d 463, 464 (2d Cir. 2005)("*Schulz I*). To enforce a summons, the government must demonstrate that: (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought is not already within the IRS's possession; and (4) that the administrative steps required by the Internal

Revenue Code have been followed. *See Powell*, 379 U.S. at 57-58. Once the government establishes this *prima facie* case for enforcement, "the burden then shifts to the taxpayer to challenge these showings on any appropriate ground, including a showing that the summons had been issued for an improper purpose, such as to harass the taxpayer, to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. White*, 853 F.2d 107, 111 (2d Cir. 1988) (quoting *Powell*, 379 U.S. at 58) (internal quotation marks omitted)).

Here, the District Court properly entered the enforcement order. The government's burden is not a heavy one, and it has been satisfied in this case by the affidavit of the investigating IRS officer, averring to each of the required elements of the government's *prima facie* case. See *id.* Astrup, in turn, has not overcome the presumption that the summons has been issued for a civil tax determination or collection purpose. *Id.* The mere fact that Astrup joined in a class action against the IRS does not, without more, establish that the IRS had issued the summons for an improper purpose. Although Astrup claimed that the IRS had already determined his tax liability for the relevant years, the summons indicated on its face that it was issued for collection purposes.

Nor was Astrup denied due process. Astrup relies on our decisions in *Schulz I & II*, in which we held that "before punishment for disobedience of an IRS summons may be levied, the agency must seek enforcement through a federal court in an

adversarial proceeding through which the taxpayer can test the validity of the summons." *Schulz v. IRS*, 413 F.3d 297, 302 (2d Cir. 2005) ("*Schulz II*"). Astrup's reliance is misplaced because a "full opportunity for judicial review of a[n] IRS summons," *see id.* (quoting *Reisman v. Caplin*, 375 U.S. 440, 450 (1964), does not necessarily include the requirement that the District Court hold an adversarial hearing to determine the validity of the summons. Nothing in *Schulz I* or *Schulz II*, overturns the well- settled rule that it is within the district court's discretion to determine, after reviewing the submissions of the parties, whether to hold a hearing. *See United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd*, 469 U.S. 310, 324 n.7 (1985). Indeed, "[u]nless a taxpayer opposing enforcement of a summons makes a substantial preliminary showing of an alleged abuse, neither an evidentiary hearing nor limited discovery need be ordered by the district court." *Id.* (internal quotations and citations omitted); *see also United States v. Gel Spice Co.*, 773 F.2d 427, 434 (2d Cir. 1985) ("With regard to both the evidentiary hearing and discovery of the documents, we have held that the burden is on defendants to make a 'substantial preliminary showing' of bad faith before an evidentiary hearing or even limited discovery is to be held."). Considering the strength of the government's submission and the lack of any record evidence suggesting an improper purpose, we cannot say that the District Court exceeded its allowable discretion by deciding the matter without a hearing.

Astrup's remaining arguments are similarly without merit. Whether or not the IRS took all the necessary administrative steps in filing its Notice of Levy is irrelevant to the determination of whether the issuance of the summons was proper. *See Powell,* 379 U.S. at 57-58. For the same reason, the District Court properly refused Astrup's motion to consolidate the proceeding with his class action regarding the IRS's Notice of Levy procedures. *See* Fed. R. Civ.P. 42(a) (requiring a common question of law or fact in order to permit a court to consolidate actions). Astrup's constitutional and jurisdictional arguments are wholly frivolous. These contentions have been repeatedly rejected by the IRS and the federal courts. *See, e.g., United States v. Ramsey,* 992 F.2d 831, 833 (8th Cir. 1993) (determining that the taxpayer had "no First Amendment right to avoid federal income taxes..."); *United States v. Collins,* 920 F.2d 619, 629 (10th Cir. 1990) (rejecting a taxpayer's argument that the IRS lacked jurisdiction over him because he did not reside on federal land).

Finally, the government asks that we sanction Astrup for filing a frivolous appeal. Astrup's primary arguments – that the government failed to meet its burden under *Powell* and that he was entitled to a hearing – are not the sort of "completely frivolous" arguments that warrant sanctions. *See, e.g., Schiff v. Comm'r,* 751 F.2d 116, 117 (2d Cir. 1984) (assessing penalties because all of the appellant's tax law claims had been repeatedly rejected by the Court). Nevertheless, continued assertion of "arguments against the income tax which have been put to rest for years,"

may result in sanctions. *Id.* (quoting *Parker v. Comm'r,* 724 F.2d 469, 472 (5th Cir. 1984)).

The order of the District Court is hereby **AFFIRMED**, and the government's motion for sanctions is **DENIED**.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: Lucille Carr

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2007
PUBLISH
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MICHAEL D. VAN DEELEN,

Plaintiff-Appellant,

v.

MARION JOHNSON; STEVEN MILES; DALE FLORY; KENNETH FANGOHR; KEN MCGOVERN; and BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, KANSAS,

Defendants-Appellees.

No. 06-3305

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 05-CV-4039-SAC)

Michael D. Van Deelen, filed a brief *pro se*.

Nicholas P. Heinke of Hogan & Hartson, Denver, Colorado, for Plaintiff- Appellant.

Peter T. Maharry (Michael K. Seck and Daniel P. Goldberg on the brief), of Fisher, Patterson, Sayler & Smith, Overland Park, Kansas, for Defendants-Appellees.

Before HARTZ, McKAY, and GORSUCH, Circuit Judges.

GORSUCH, Circuit Judge.

Michael D. Van Deelen alleges that the Board of County Commissioners of Douglas County, Kansas, as well as five county officials, violated his First Amendment rights by seeking to threaten and intimidate him into dropping various tax assessment challenges. The United States District Court for the District of Kansas, in reliance on a number of its prior holdings, granted summary judgment for the defendants on the basis that Mr. Van Deelen's tax challenge was not a matter of "public concern." We write today to reaffirm that the constitutionally enumerated right of a private citizen to petition the government for the redress of grievances does not pick and choose its causes but extends to matters great and small, public and private. Whatever the public significance or merit of Mr. Van Deelen's petitions, they enjoy the protections of the First Amendment. Accordingly, we reverse and remand.

Appendix K

I

A

Viewing the facts pertinent to the current dispute, as we must, in the light most favorable to Mr. Van Deelen as the party opposing summary judgment,[1] his tangle with the County began in 1991.

That year, Mr. Van Deelen purchased a home that, shortly after the transaction settled, suffered from repeated flooding. After a particularly severe episode in 1993, Mr. Van Deelen sued the County and the City of Eudora, in which the home is located, complaining that a nearby culvert was undersized and contributing to the flooding. The County and City eventually paid him a sum for his damages and replaced the culvert with a bridge; thereafter, Mr. Van Deelen dismissed his suit.

Beginning in 2000, Mr. Van Deelen believed that the County's annual increases in the assessed value of his home unfairly overstated his home's true market value, in part by inadequately accounting for what he perceived to be a continuing threat of flooding. During the next several years, he unsuccessfully appealed the County's assessments at approximately eight different administrative

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[1] Additionally, all of Mr. Van Deelen's filings in the district court and this court were prepared pro se and are thus entitled to a solicitous construction. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *see also Riddle v. Mondragon*, 83 F.3d 1197, 1201-02 (10th Cir. 1996). Mr. Van Deelan was, however represented at oral argument before us by court-appointed counsel, Nicholas P. Heinke, whom we wish to thank for his generous and able *pro bono* advocacy.

hearings. In the course of these appeals, Mr. Van Deelen interacted frequently with both Marion Johnson, the County Appraiser, and Steven Miles, an appraiser in Mr. Johnson's office. Bad blood soon set in.

In one 2002 hearing, Mr. Van Deelen allegedly made "accusatory"and "derogatory" remarks towards Mr. Miles that prompted the hearing officer to discontinue the proceedings. In spite of this incident, Mr. Miles agreed to meet again with Mr. Van Deelen the following week at the Appraiser's office, located
in the old Douglas County Courthouse. Before that meeting, however, Mr. Miles expressed to Mr. Johnson his concern about Mr. Van Deelen's behavior; in turn, Mr. Johnson asked the Sheriff's Department to assign one of its deputies to be available outside the Appraiser's office during the meeting. As it indeed turned out, when Mr. Van Deelen and Mr. Miles met at the appointed time, Mr. Johnson, who was close by Mr. Miles's office, perceived the tone to grow increasingly loud and disruptive. Eventually, Mr. Johnson decided to interrupt and terminate the meeting, and did so with the assistance of Sergeant Kenneth Fangohr, the member of the Sheriff's Department assigned to provide the requested security.

Mr. Van Deelen continued to dispute the County's tax assessments and, in February 2005, filed suit in federal court, naming as defendants Mr. Miles, Mr. Johnson, and the County, and alleging, among other things, unconstitutional property valuations and perjury by Mr. Miles in his testimony at administrative hearings. Not long

after in March 2005, the County reduced by $5,000 the assessed value of Mr. Van Deelen's home, and Mr. Van Deelen dismissed the suit.[2]

But this was hardly the end of the matter. Mr. Van Deelen pursued yet another tax appeal with the Appraiser's office in late March 2005, even after the resolution of his federal lawsuit. A meeting was scheduled, and Mr. Johnson again requested that someone from the Sheriff's office attend; this time, however, he asked the Sheriff's representative to sit inside, not outside, the meeting room. Because Sergeant Fangohr was unavailable that day, the job went to Deputy Dale Flory. While defendants submit that the deputy was present simply to ensure that the meeting did not get out of control, Mr. Van Deelen alleges that the deputy's attendance was calculated to intimidate him in retaliation for his lawsuits and appeals and to deter him from bringing future appeals.

Indeed, Mr. Van Deelen alleges that, upon his arrival at the meeting, Mr. Miles stated that "[t]oday you get payback for suing us." Mr. Van Deelen further alleges that Deputy Flory pulled his chair right next to Mr. Van Deelen, deliberately "bumping" Mr. Van Deelen's arm and leg with his own in the process. Mr. Van Deelen asserts that the deputy's presence surprised and frightened him. When he asked why the deputy was there, Mr. Miles responded that Deputy Flory had come at the

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[2] While Mr. Van Deelen claims the County reduced the assessment in response to his lawsuit, defendants contend that the reduction was a result of additional information provided to the Appraiser's office by Mr. Van Deelen.

request of Mr. Johnson based upon plaintiff's prior behavior. Mr. Van Deelen alleges that Deputy Flory repeatedly and intentionally "bumped" him throughout the meeting, and that when Mr. Van Deelen looked up, Deputy Flory held his hand on his gun and made menacing looks. Mr. Van Deelen also alleges that Mr. Miles "brow beat" him throughout the meeting by scowling and staring. After "an exchange of words," including threats by Mr. Van Deelen to file another lawsuit, Mr. Miles ended the meeting. Mr. Van Deelen contends that Deputy Flory then stood up and told him to leave. During this exchange, Deputy Flory also allegedly poked Mr. Van Deelen's chest with his finger and stated: "Don't come back. Johnson and Miles are mad because you sued them. They told me to do whatever necessary to put a scare into you. If you show up for another tax appeal hearing, I might have to shoot you." Deputy Flory then told Mr. Van Deelen to leave immediately, not allowing him to collect his tax papers.

Mr. Van Deelen claims this episode has deterred him from his continued pursuit of tax appeals at the Appraiser's office.[3] As evidence, he presents a letter he sent to the Kansas Board of Tax Appeals in November 2005, cancelling his requested hearing and citing the threat of violence by the County as the reason for doing so. Seeking compensation for his alleged injuries, as well as injunctive and declaratory relief, Mr. Van Deelen brought suit in federal district court against Mr. Johnson, Mr. Miles, Deputy Flory, Sergeant Fangohr, Sheriff Ken McGovern, and the County

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[3] Mr. Van Deelen does not contest, however, that he has gone back to the courthouse for other non-tax-related business.

Board of Commissioners. Mr. Van Deelen's suit alleges various violations of the First and Fourteenth Amendments, actionable by means of 42 U.S.C. § 1983, as well as various violations of state tort law.

B

In due course, the district court entertained and granted defendants' motion for summary judgment with respect to all of Mr. Van Deelen's federal constitutional claims. With respect to his First Amendment claims, the district court held, *inter alia*, that Mr. Van Deelen's pursuit of legal and administrative remedies against the County relating to his tax assessments failed to qualify as protected constitutional conduct because it did not implicate matters of public concern and instead "aimed only at advancing [his] financial interest and achieving only redress for [his] private grievances." Dist. Ct. Op. 12. The district court also disposed of Mr. Van Deelen's Fourteenth Amendment claims, finding a lack of evidence of any substantive or procedural due process violation and no basis for asserting a violation of equal protection; it similarly found no merit to Mr. Van Deelen's invasion of privacy and § 1983 conspiracy claims. Having thus extinguished his federal claims, the court dismissed without prejudice Mr. Van Deelen's remaining pendent state law claims pursuant to 28 U.S.C. § 1367(c).

Mr. Van Deelen filed a timely notice of appeal seeking reversal of the district court's disposition on all but two matters: he does not challenge the court's dismissal of the equal

protection and invasion of privacy claims. Mr. Van Deelen further conceded at oral argument that his appeal on First Amendment grounds pertains only to Mr. Miles, Mr. Johnson, and Deputy Flory, and that he does not appeal the district court's conclusion that he lacks evidence of retaliatory conduct by Sergeant Fangohr or Sheriff McGovern. Our primary and initial focus in this case, thus, concerns Mr. Van Deelen's claim that Mr. Miles, Mr. Johnson, and Deputy Flory unlawfully retaliated against him for engaging in protected First Amendment petitioning activity.

II

The promise of self-government depends on the liberty of citizens to petition the government for the redress of their grievances. When public officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise. "The very idea of a government, republican in form, implies a right on the part of its citizens . . . to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); see also *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights.").

To make out a claim of unlawful retaliation by government officials in response to the exercise of his or her First Amendment right to petition, we

have indicated three elements must be present. The plaintiff must show that (a) he or she was engaged in constitutionally protected activity; (b) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (c) the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. See *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). We address each element in turn.

A

The defendants argue vigorously that Mr. Van Deelen's lawsuits and administrative appeals do not amount to "constitutionally protected activity" and thus fail the first prong of the *Worrell* test. This is so, defendants submit, because Mr. Van Deelen's activity involved only private tax disputes and not issues of "public concern." We cannot agree.

One might well (as defendants do) question the merits of Mr. Van Deelen's petitions or their significance, arising as they do from an ongoing and increasingly personal spat with County tax officials. But a private citizen exercises a constitutionally protected First Amendment right *anytime* he or she petitions the government for redress; the petitioning clause of the First Amendment does not pick and choose its causes. The minor and questionable, along with the mighty and consequential, are all embraced. This is, of course, not to say that the "public concern" test proffered by defendants and adopted by the district

court has no place in the law of the First Amendment. Rather, the test quite properly applies to claims brought by government employees – but its scope reaches no further.

Because of the government's need to maintain an efficient workplace in aid of the public's business, the Supreme Court has long recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Accordingly, the Court has held, the government may in some instances employ constraints on the speech and activities of employees that would be unconstitutional if applied to private citizens.[4] Still, even in the public workplace context, the Supreme Court has sought to balance the employees' rights as citizens with the government's interests as employer; because expression relating to issues of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks

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[4] *See, e.g., Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."); *Connick v. Myers*, 461 U.S. 138, 146 (1983) ("[G]overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); *Waters v. Churchill*, 511 U.S. 661, 672 (1994); *City of San Diego v. Roe*, 543 U.S. 77, 80-84 (2004).

omitted), speech affecting such matters remains protected even for government employees.[5]

The public concern test, then, was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens. To apply the public concern test outside the public employment setting would require us to rend it from its animating rationale and original context. Admittedly, defendants point us to a considerable line of cases from the District of Kansas appearing to do just this.[6] But these holdings are neither compelled by nor consistent with the First Amendment. As we have explained, "it is the government's powers and responsibilities *as an employer* that warrant restrictions on speech," including the public concern requirement, "*that would not be justified in other contexts.*" *Worrell*, 219 F.3d at 1210 (emphases added). And as our sister circuits have

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[5] The Supreme Court has also recently indicated that, to merit First
Amendment protection, a public employee's speech, though related to matters of public concern, must not have been made pursuant to his or her official duties. See *Garcetti*, 126 S. Ct. at 1959-62; *see also Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1328 (10th Cir. 2007).

[6] *See Van Deelen v. Shawnee Mission Unified Sch. Dist.* # 512, 316 F.
Supp. 2d 1052, 1058-59 (D. Kan. 2004); *Delkhah v. Moore*, 2006 WL 1320255, at *8-9 (D. Kan. May 15, 2006); *Howse v. Atkinson*, 2005 WL 1076527, at *6 (D. Kan. May 4, 2005). The district court also cited *McCook v. Springer Sch. Dist.*, 44 F. App'x. 896, 903-04 (10th Cir. 2002) (unpub.), an unpublished and nonbinding decision of this circuit that, while ambiguous, allowed a private plaintiff's First Amendment claim in part on the ground that at least some of the speech at issue involved matters of public concern. See id. at 904.

put the point, "[t]he story of the public concern limitation is a story about the free speech of public employees," *Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir. 1999) (en banc), and any attempt to apply it to the broader context of speech by private citizens would quite mistakenly "curtail a significant body of free expression that has traditionally been fully protected under the First Amendment," *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004).[7]

B

Under *Worrell's* second requisite, Mr. Van Deelen must show that the defendants' actions caused him "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity." 219 F.3d at 1212. If accepted as credible by a jury, Mr. Van Deelen's allegations of physical and verbal intimidation, including a threat by a deputy sheriff to shoot him if he brought any more tax appeals, would surely suffice under our precedents to chill a person of ordinary firmness from continuing to seek redress for (allegedly) unfair property tax assessments. See, e.g., *Perez v. Ellington*, 421 F.3d 1128, 1132 (10th Cir. 2005) (finding the rushed imposition of tax assessments and a delay in removing tax liens after their abatement sufficient to chill a person of

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[7] *See also Campagna v. Mass. Dep't of Envtl. Prot.*, 334 F.3d 150, 154-55 (1st Cir. 2003); *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000); *Eichenlaub*, 385 F.3d at 282-84; *Gable v. Lewis*, 201 F.3d 769, 771-72 (6th Cir. 2000); *Thaddeus-X*, 175 F.3d at 388-90; *Vickery v. Jones*, 100 F.3d 1334, 1346 n.1 (7th Cir. 1996); cf. *United States v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996); *Dossett v. First State Bank*, 399 F.3d 940, 950 (8th Cir. 2005).

ordinary firmness from continuing in constitutionally protected activity). Further, Mr. Van Deelen presented evidence of his actual injury; his deposition testimony and his letter to the Board of Tax Appeals suggest that defendants' actions did, in fact, deter him from further tax appeals. Of course, a jury is free to find Mr. Van Deelen's evidence unpersuasive or incredible, but that is the function of the fact finder, not this court, in our judicial system.

C

Finally, Mr. Van Deelen must show that defendants' "adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Worrell*, 219 F.3d at 1212. In aid of this cause, Mr. Van Deelen points us to Mr. Miles's alleged statement, "Today you get payback for suing us," and Deputy Flory's alleged statement, "Johnson and Miles are mad because you sued them." Although defendants deny making these statements, and the jury is free to so find, we cannot dispute that a reasonable jury could infer from them an impermissible retaliatory motive. *See, e.g., DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (finding sufficient evidence of retaliatory motive from police detective's statement: "Payback is hell, that's what she got for hiring a smart-ass lawyer.").

III

Defendants suggest that, even if Mr. Van Deelen satisfies *Worrell's* tripartite test and might otherwise have a triable retaliation claim for

interference with his right to petition, they are entitled to qualified immunity. When a defendant asserts qualified immunity, the responsibility shifts to the plaintiff to meet the burden of demonstrating first, that the defendant's actions, viewed here through the prism of our summary judgment standard and thus examined in the light most favorable to the plaintiff, violated a constitutional or statutory right; and, second, that the right at issue was clearly established at the time of the defendant's allegedly unlawful conduct. *Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir. 2007); *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). If the plaintiff fails to satisfy either part of this two-part test, we grant qualified immunity. *Casey*, 473 F.3d at 1327.[8]

We believe Mr. Van Deelen has overcome both qualified immunity hurdles. As we have already indicated, Mr. Van Deelen has alleged facts from which a reasonable jury could (though need not necessarily) conclude that a violation of the First Amendment took place. And the right at issue – to petition the government for the redress of tax grievances – has been with us and clearly established since the Sons of Liberty visited Griffin's Wharf in Boston. Defendants respond by

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[8] Even where the law is clearly established, a defendant may still be entitled to qualified immunity by claiming extraordinary circumstances, such as reliance on a state statute or regulation or the advice of legal counsel, and proving that he neither knew nor should have known the relevant legal standard. *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 842 (10th Cir. 2005). Defendants here, however, make no such claim of extraordinary circumstances, but instead simply assert that the law was not clearly established.

pointing us again to the line of cases from Kansas district courts, *see supra* note 6, arguing that it "muddied the water" sufficiently that a reasonable official would not have known that private citizens have a First Amendment right to petition on private as well as public matters. But every case discussing the public concern test in the Supreme Court has made pellucid that it applies only to public employees. *See, e.g., Connick*, 461 U.S. at 143-49; *Waters*, 511 U.S. at 671-82; City of San Diego, 543 U.S. at 80-84; *Garcetti*, 126 S. Ct. at 1957-62. The same is true of our own precedent. *See, e.g., Martin v. City of Del City*, 179 F.3d 882, 886 (10th Cir. 1999) (explicitly stating six times within a single page that the public concern test applies specifically to claims by public employees); *Schalk v. Gallemore*, 906 F.2d 491, 494-95 (10th Cir. 1990); *Burns v. Bd. of County Comm'rs*, 330 F.3d 1275, 1285-86 (10th Cir. 2003). And none of our published opinions concerning the right of petition by private citizens has even hinted at a public concern requirement. *See, e.g., Beedle v. Wilson,* 422 F.3d 1059, 1065-67 (10th Cir. 2005); *Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999); *DeLoach*, 922 F.2d at 620; *Penrod v. Zavares*, 94 F.3d 1399, 1404-06 (10th Cir. 1996). The same is true of our sister circuits. *See supra* pp. 11-12 and note 7. Reliance on district court and unpublished decisions in the face of such uniform governing authority from the Supreme Court, as well as this circuit and every other circuit to have addressed the question, is not sufficient to avoid liability.

Put simply, and taking as true Mr. Van Deelen's version of the facts as we must, we hold

(unremarkably, we think) that a reasonable government official should have clearly understood at the time of the events at issue that physical and verbal intimidation intended to deter a citizen from pursuing a private tax complaint violates that citizen's First Amendment right to petition for the redress of grievances.

IV

In addition to his petitioning claim, Mr. Van Deelen alleges a number of other First Amendment violations, including that defendants infringed his rights of speech, assembly (by denying him access to the county courthouse for the purpose of pursuing tax appeals), and association (by denying him access to courthouse employees). The district court viewed all such claims as "merely restat[ing]" Mr. Van Deelen's claim for interference with his right to petition and dismissed them because they, too, did not relate to matters of public concern. As we have indicated, however, the public concern test enjoys no place in the analysis of a private citizen's First Amendment claims. Accordingly, we reverse the district court's summary judgment on these counts as well. But, acknowledging that they were only briefly developed before us in a *pro se* brief, and that proper but as-yet unanalyzed grounds for summary judgment or qualified immunity may exist, we believe the prudent course is to ask the district court to conduct such examinations in the first instance on remand.

Beyond his First Amendment claims, Mr. Van Deelen also appeals the district court's summary judgment on his claims of conspiracy and

violations of due process, as well as his claim against the County for adopting a policy or custom that caused him to be deprived of his federal rights. We have independently reviewed these claims and can report them to be without merit and thus properly dismissed by the district court. However, because we have renewed the original basis for supplemental jurisdiction by reviving and remanding Mr. Van Deelen's First Amendment claims, we vacate the district court's dismissal of his state tort claims and reinstate them to this suit. *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 590 n.1 (10th Cir. 1999).[9]

* * *

To summarize, because the right of a private citizen to seek the redress of grievances is not limited to matters of "public concern," we reverse the district court's grant of summary judgment with respect to defendants Mr. Miles, Mr. Johnson, and Deputy Flory on Mr. Van Deelen's claim for interfering with his First Amendment right to petition and remand that matter for trial. With respect to these same defendants and Mr. Van Deelen's remaining First Amendment claims, we reverse and remand for the further proceedings we

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[9] Separately, appellees argue that Mr. Van Deelen's *pro se* brief suffers from "substantial deficiencies" sufficient to warrant summary dismissal of this appeal under *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005). Though perhaps no model of appellate argument, Mr. Van Deelen's *pro se* brief suffers from far fewer deficiencies than appellees contend, and, happily, it does not come close to sinking to the low blows of the brief at issue in *Garrett*, which did "little more than attempt to impugn (without basis) the integrity of the district judge." *Id.* at 841.

have outlined. We affirm the district court's grant of summary judgment on plaintiffs' various First Amendment claims as against defendants Sergeant Fangohr, Sheriff McGovern, and the County. We also affirm the district court's grant of summary judgment to all defendants with respect to Mr. Van Deelen's claims of conspiracy and violations of due process. Finally, we vacate the district court's dismissal of Mr. Van Deelen's state law claims.

So ordered.

Appendix L

Internal Revenue Service
Area Director
Michael T. Donovan

Treasury Department
Internal Revenue Service
PO Box 5137
Grand Central Station
New York, NY 10163
SB/SE Territory 5 Area 2 Group 5-2 AR

Date: 04/04/03 Examiner: Anthony Roundtree
Telephone Number: (212) 719-6145

Robert L. Schulz
2458 Ridge Rd.
Queensbury, NY 12804

Refer Reply To: SB/SE 1352AR
ID #13-23874
Date & Time of Examination:
5/15/03 9:00 AM
Place of Appointment:
2458 Ridge Rd. Queensbury,
NY 12804

Mr. Robert Schulz

We have reviewed certain materials with respect to your tax shelter promotion. We are considering possible action under Section 6700 and 7408 of the Internal Revenue Code relating to penalties and an injunction action for promoting abusive tax shelters. In addition, we plan to consider issuing "re-filing notification" letters to the investors who have invested in this promotion.

You are requested to meet with the examiner at the above date, time and location. Enclosed is a list of documents, books and records that you should have available and questions you should be prepared to reply to at that time.

If we conclude that penalties, injunction, and/or "pre-filing notification" action is appropriate, you will be afforded an opportunity to present any facts or legal arguments that you feel indicate that such action should not be taken.

Sincerely,

Enclosures:
IDR

Anthony Roundtree
Revenue Agent

Appendix M

HISTORICAL RECORD OF THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

Plaintiffs argued in their pleadings in all three cases that their interpretation of the meaning of the Petition Clause of the First Amendment is strongly supported by all of history, from the English Magna Carta to the American Declaration of Independence and beyond, and that there is absolutely nothing in American History or Jurisprudence that contradicts Plaintiffs' interpretation.

The following are the highlights of Plaintiffs' argument:

Chapter 61 of the Magna Carta (the cradle of Liberty and Freedom from wrongful government, signed at a time when King John was sovereign) reads in relevant part:

> " 61. Since, moveover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have

granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us...." (emphasis added by Plaintiffs).

Chapter 61 was a procedural vehicle for enforcing the rest of the Charter. It spells out the Rights of the People and the obligations of the Government,

and the procedural steps to be taken by the People and the King, in the event of a violation by the King of any provision of that Charter: the People were to transmit a Petition for a Redress of their Grievances; the King had 40 days to respond; if the King failed to respond in 40 days, the People could non-violently retain their money or violence could be legally employed against the King until he Redressed the alleged Grievances.[1]

The 1689 Declaration of Rights proclaimed, "[I]t is the Right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal." This was obviously a basis of the "shall make no law abridging the right to petition government for a redress of grievances" provision of our Bill of Rights.

In 1774, the same Congress that adopted the Declaration of Independence unanimously adopted an Act in which they gave meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement as they spoke about the People's "Great Rights." Quoting:

> "If money is wanted by rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility." "Continental Congress To The Inhabitants Of The Province Of Quebec." Journals of the

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[1] See Magna Carta Chapter 61. See also William Sharp McKechnie, Magna Carta 468-77 (2nd ed. 1914)

Appendix M

Continental Congress 1774, Journals 1: 105-13.

In 1775, just prior to drafting the Declaration of Independence, Jefferson gave further meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement. Quoting:

> **"The privilege of giving or withholding our moneys is an important barrier against the undue exertion of prerogative which if left altogether without control may be exercised to our great oppression; and all history shows how efficacious its intercession for redress of grievances and reestablishment of rights, an hou improvident would be the surrender of so powerful a mediator."** Thomas Jefferson: Reply to Lord North, 1775. Papers 1:225.

In 1776, the Declaration of Independence was adopted by the Continental Congress. The bulk of the document is a listing of the Grievances the People had against a Government that had been in place for 150 years. The final Grievance on the list is referred to by scholars as the "capstone" Grievance. The capstone Grievance was the ultimate Grievance, the Grievance that prevented Redress of these other Grievances, the Grievance that caused the People to non-violently withdraw their support and allegiance to the Government, and the Grievance that eventually justified War against the King, morally and legally. The Congress gave further meaning to the People's Right to Petition for Redress of Grievances and the

Right of enforcement. Quoting the Capstone Grievance:

> "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by with repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is thus unfit to be the ruler of a free people....We, therefore...declare, That these United Colonies...are Absolved from all Allegiance to the British Crown...." ***Declaration of Independence***, 1776

> "On every question of the construction of the Constitution, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."
>
> Thomas Jefferson, Letter to
> William Johnson, Supreme Court Justice
> (1823)

Though the Rights to Popular Sovereignty and its "protector" Right, the Right of Petition for Redress have become somewhat forgotten, they took shape early on by Government's *response* to Petitions for

Redress of Grievances.[5] The Right is not changed by the fact that the Petition Clause lacks an affirmative statement that Government shall respond to Petitions for, "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison.* 5 U.S. (1 Cranch) 139 (1803). For instance, the 26th Amendment guarantees all citizens above the age of 18 the Right to Vote, it does not contain an affirmative statement that the Government shall count the votes.

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[5] See A SHORT HISTORY OF THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES, Stephen A. Higginson, 96 Yale L.J. 142(November, 1986); "SHALL MAKE NO LAW ABRIDGING . . .": AN ANALYSIS OF THE NEGLECTED, BUT NEARLY ABSOLUTE, RIGHT OF PETITION, Norman B. Smith, 54 U. Cin. L. Rev. 1153 (1986);"LIBELOUS" PETITIONS FOR REDRESS OF GRIEVANCES -- BAD HISTORIOGRAPHY MAKES WORSE LAW, Eric Schnapper, 74 Iowa L. Rev. 303 (January 1989);THE BILL OF RIGHTS AS A CONSTITUTION, Akhil Reed Amar, 100 Yale L.J. 1131 (March, 1991); NOTE: A PETITION CLAUSE ANALYSIS OF SUITS AGAINST THE GOVERNMENT: IMPLICATIONS FOR RULE 11 SANCTIONS, 106 Harv. L. Rev. 1111 (MARCH, 1993); SOVEREIGN IMMUNITY AND THE RIGHT TO PETITION: TOWARD A FIRST AMENDMENT RIGHT TO PURSUE JUDICIAL CLAIMS AGAINST THE GOVERNMENT, James E. Pfander, 91 Nw. U.L. Rev. 899 (Spring 1997);THE VESTIGIAL CONSTITUTION: THE HISTORY AND SIGNIFICANCE OF THE RIGHT TO PETITION, Gregory A. Mark, 66 Fordham L. Rev. 2153 (May, 1998); DOWNSIZING THE RIGHT TO PETITION, Gary Lawson and Guy Seidman, *93 Nw. U.L. Rev. 739* (Spring 1999); A RIGHT OF ACCESS TO COURT UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT: DEFINING THE RIGHT, Carol Rice Andrews, 60 Ohio St. L.J. 557 (1999) ; MOTIVE RESTRICTIONS ON COURT ACCESS: A FIRST AMENDMENT CHALLENGE, Carol Rice Andrews, 61 Ohio St. L.J. 665 (2000).

Appendix M

The Right to Petition is a distinctive, substantive Right, from which other First Amendment Rights were *derived*. The Rights to free speech, press and assembly originated as *derivative* Rights insofar as they were necessary to protect the *preexisting* Right to Petition. Petitioning, as a way to hold Government accountable to natural Rights, originated in England in the 11th century[6] and gained recognition as a Right in the mid 17th century.[7] Free speech Rights first developed because members of Parliament needed to discuss freely the Petitions they received.[8] Publications reporting Petitions were the first to receive protection from the frequent prosecutions against the press for seditious libel.[9] Public meetings to prepare Petitions led to the Right of Public Assembly.[10]

The Right to Petition was widely accorded greater importance than the Rights of free expression. For instance, in the 18th century, the House of Commons, [11] the American Colonies, [12] and the first

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[6] Norman B. Smith, "Shall Make No Law Abridging...": Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, at 1154.

[7] See Bill of Rights, 1689, 1 W & M., ch. 2 Sections 5,13 (Eng.), reprinted in 5 THE FOUNDERS' CONSITUTION 197 (Philip B. Kurland & Ralph Lerner eds., 1987); 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39.

[8] See David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, at 115.

[9] See Smith, *supra* n.4, at 1165-67.

[10] See Charles E. Rice, *Freedom of Petition*, in 2, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 789, (Leonard W. Levy ed., 1986)

[11] See Smith, *supra* n4, at 1165.

Continental Congress[13] gave official recognition to the Right to Petition, but not to the Rights of Free Speech or of the Press.[14]

The historical record shows that the Framers and Ratifiers of the First Amendment also understood the Petition Right as distinct from the Rights of free expression. In his original proposed draft of the Bill of Rights, Madison listed the Right to Petition and the Rights to speech and press in two separate sections.[15] In addition, a "considerable majority" of Congress defeated a motion to strike the assembly provision from the First Amendment because of the understanding that all of the rights in the First Amendment were separate Rights that should be specifically protected.[16]

Petitioning Government for Redress has played a key role in the development and enforcement of popular sovereignty throughout British and

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[12] For example, Massachusetts secured the Right to Petition in its Body of Liberties in 1641, but freedom of speech and press did not appear in the official documents until the mid-1700s. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463 n.47 (1983).

[13] See id. at 464 n.52.

[14] Even when England and the American colonies recognized free speech Rights, petition Rights encompassed freedom from punishment for petitioning, whereas free speech Rights extended to freedom from prior restraints. See Frederick, *supra* n6, at 115-16.

[15] See New York Times Co. v. U.S., 403 U.S. 670, 716 n.2 (1971)(Black, J., concurring). For the full text of Madison's proposal, see 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834).

[16] See 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS at 1089-91 (1980).

American history. [17] In medieval England, petitioning began as a way for barons to inform the King of their concerns and to influence his actions.[18] Later, in the 17th century, Parliament gained the Right to Petition the King.[19] This broadening of participation culminated in the official recognition of the right of Petition in the People themselves.[20]

The People used this newfound Right to question the legality of the Government's actions,[21] to present their views on controversial matters,[22] and to demand that the Government, *as the creature*

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[17] See Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 10-108 (1971) (unpublished Ph.D. dissertation) (Univ. Microforms Int'l); K. Smellie, Right to Petition, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98, 98-101 (R.A. Seiligman ed., 1934).

[18] The Magna Carta of 1215 guaranteed this Right. See MAGNA CARTA, ch. 61, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n.5, at 187.

[19] See PETITION OF RIGHT chs. 1, 7 (Eng. June 7, 1628), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 187-88.

[20] In 1669, the House of Commons stated that, "it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievances, and the House of Commons to receive the same." Resolution of the House of Commons (1669), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 188-89.

[21] For example, in 1688, a group of bishops sent a petition to James II that accused him of acting illegally. See Smith, *supra* n4, at 1160-62. James II's attempt to punish the bishops for this Petition led to the Glorious Revolution and to the enactment of the Bill of Rights. See Smith, *supra* n15 at 41-43.

[22] See Smith, *supra* n4, at 1165 (describing a Petition regarding contested parliamentary elections).

and servant of the People, be responsive to the popular will.[23]

In the American colonies, disenfranchised groups used Petitions to seek government accountability for their concerns and to rectify Government misconduct.[24] By the nineteenth century, Petitioning was described as "essential to ... a free government,"[25] an inherent feature of a republic[26] and a means of enhancing Government accountability through the participation of citizens.

Government accountability was understood to include response to petitions.[27] American colonists, who exercised their Right to Petition the King or

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[23] In 1701, Daniel Defoe sent a Petition to the House of Commons that accused the House of acting illegally when it incarcerated some previous petitioners. In response to Defoe's demand for action, the House released those Petitioners. See Smith, *supra* n4, at 1163-64.

[24] See RAYMOND BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 43-44 (1979).

[25] THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (6th ed. 1890).

[26] See CONG. GLOBE, 39th Cong., 1st Session. 1293 (1866) (statement of Rep. Shellabarger) (declaring petitioning an indispensable Right "without which there is no citizenship" in any government); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 707 (Carolina Academic Press ed. 1987) (1833) (explaining that the Petition Right "results from [the] very nature of the structure [of a republican government]").

[27] See Frederick, *supra* n7 at 114-15 (describing the historical development of the duty of government response to Petitions).

Parliament, [28] expected the Government to receive *and respond* to their Petitions.[29] The King's persistent refusal to answer the colonists' grievances outraged the colonists and as the "capstone" grievance, was a significant factor that led to the American Revolution.[30]

Frustration with the British Government led the Framers to consider incorporating a people's right to "instruct their Representatives" in the First Amendment.[31] Members of the First Congress easily defeated this right-of-instruction proposal.[32] Some discretion to reject petitions that "instructed government," they reasoned, would not undermine Government accountability to the People, as long as Congress had a duty to consider petitions *and fully respond to them.*[33]

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[28] See DECLARATION AND RESOLVES OF THE CONTINENTAL CONGRESS 3 (Am. Col. Oct. 14, 1774), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; DECLARATION OF RIGHTS OF THE STAMP ACT CONGRESS 13 (Am. Col. Oct. 19, 1765), *reprinted in id.* at 198.

[29] See Frederick, *supra n7* at 115-116.

[30] See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. July 4, 1776), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; Lee A. Strimbeck, The Right to Petition, 55 W. VA. L. REV. 275, 277 (1954).

[31] See 5 BERNARD SCHWARTZ, *supra* n15, 1091-105.

[32] The vote was 10-41 in the House and 2-14 in the Senate. See *id.* at 1105, 1148.

[33] See 1 ANNALS OF CONG. 733-46 (Joseph Gales ed., 1789); 5 BERNARD SCHWARTZ, *supra* n15, at 1093-94 (stating that representatives have a duty to inquire into the suggested measures contained in citizens' Petitions) (statement of Rep. Roger Sherman); *id.* at 1095-96 (stating that Congress can never shut its ears to Petitions) (statement of Rep. Elbridge Gerry); *id.* at 1096 (arguing that the Right to Petition protects the Right to bring non-binding instructions to Congress's attention) (statement of Rep. James Madison).

Congress viewed the receipt and serious consideration of every Petition as an important part of its duties.[34] Congress referred Petitions to committees[35] and even created committees to deal with particular types of Petitions.[36] Ultimately, most Petitions resulted in either favorable legislation or an adverse committee report. [37] Thus, throughout early Anglo-American history, general petitioning (as opposed to judicial petitioning) allowed the people a means of direct political participation that in turn demanded government *response* and promoted accountability.

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[34] See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 15, 1975, at 6-9 (Comm. Print 1986) (including a comment by the press that "the principal part of Congress's time has been taken up in the reading and referring Petitions" (quot. omitted)).

[35] See Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for the Redress of Grievances,* 96 YALE L. J. 142, at 156.

[36] See H.J., 25th Cong., 2d Sess. 647 (1838) (describing how petitions prompted the appointment of a select committee to consider legislation to abolish dueling).

[37] See Higginson, n34 at 157.

Sec. 6700 Promoting abusive tax shelter, etc.
(a) Imposition of penalty.

Any person who—

(1)(A) organizes (or assists in the organization of) –

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) –

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter, shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the

preceding sentence, activities described in paragraph (1)
(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1) (B) shall be so treated.

(b) Rules relating to penalty for gross valuation over-statements.

(1) Gross valuation overstatement defined. For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or service --
(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and
(B) the value of such property or services is directly related the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) Authority to waive. The Secretary may waive all
Or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties.
The penalty imposed by this section shall be in addition to any other penalty provided by law.

Sec. 6701. Penalties for aiding and abetting understatement of tax liability.

(a) Imposition of penalty.

Any person –

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person, shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) **Amount of penalty.**

(1) **In general.** Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) **Corporations.** If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) **Only 1 penalty per person per period.** If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(4) **Activities of subordinates.**

(1) **In general.** For purposes of subsection (a), the term "procures" includes ··

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act. (2)**Subordinate.** For purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge.

Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance.

For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.

(1) **In general.** Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) **Coordination with return preparer penalties.** No penalty shall be assessed under subsection (a) or (b) of section 6694 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) **Coordination with section 6700.** No penalty shall be assessed under section 6700 on any person

with respect to any document for which a penalty is assessed on such person under subsection (a).

Appendix O

CONTINENTAL CONGRESS TO THE INHABITANTS OF THE PROVINCE OF QUEBEC

26 Oct. 1774

Journals 1:105-13

Friends and fellow-subjects,

We, the Delegates of the Colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, the Counties of Newcastle Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina and South-Carolina, deputed by the inhabitants of the said Colonies, to represent them in a General Congress at Philadelphia, in the province of Pennsylvania, to consult together concerning the best methods to obtain redress of our afflicting grievances, having accordingly assembled, and taken into our most serious consideration the state of public affairs on this continent, have though proper to address your province, as a member therein deeply interested.

When the fortune of war, after a gallant and glorious resistance, had incorporated you with the body of English subjects, we rejoiced in the truly valuable addition, both on our own and your account; expecting, as courage and generosity are naturally united, our brave enemies would become our hearty friends, and that the Divine Being would bless to you the dispensations of his over-ruling providence, by securing to you and your latest posterity the inestimable advantages of a free English constitution of government, which it is the privilege of all English subjects to enjoy.

These hopes were confirmed by the King's proclamation, issued in the year 1763, plighting the

public faith for your full enjoyment of those advantages.

Little did we imagine that any succeeding Ministers would so audaciously and cruelly abuse the royal authority, as to with-hold from you the fruition of the irrevocable rights, to which you were thus justly entitled.

But since we have lived to see the unexpected time, when Ministers of this flagitious temper, have dared to violate the most sacred compacts and obligations, and as you, educated under another form of government, have artfully been kept from discovering the unspeakable worth of that form you are now undoubtedly entitled to, we esteem it our duty, for the weighty reasons herein after mentioned, to explain to you some of its most important branches.

"In every human society," says the celebrated Marquis Beccaria, "there is an *effort, continually tending* to confer on one part of the heighth of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to *oppose this effort*, and to diffuse their influence *universally* and *equally*."

Rulers stimulated by this pernicious "effort," and subjects animated by the just "intent of opposing good laws against it," have occasioned that vast variety of events, that fill the histories of so many nations. All these histories demonstrate the truth of this simple position, that to live by the will of one man, or sett of men, is the production of misery to all men.

On the solid foundation of this principle, Englishmen reared up the fabrick of their constitution with such a strength, as for ages to defy time, tyranny, treachery, internal and foreign

wars: And, as an illustrious author of your nation, hereafter mentioned, observes, -- "They gave the people of their Colonies, the form of their own government, and this government carrying prosperity along with it, they have grown great nations in the forests they were sent to inhabit."

In this form, the first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by *laws*, which they themselves approve, not by *edicts of men* over whom they have no controul. This is a bulwark surrounding and defending their property, which by their honest cares and labours they have acquired, so that no portions of it can legally be taken from them, but with their own full and free consent, when they in their judgment deem it just and necessary to give them for public service, and precisely direct the easiest, cheapest, and most equal methods, in which they shall be collected.

The influence of this right extends still farther. If money is wanted by Rulers, who have in any manner oppressed the people, they may retain it, until their grievances are redressed; and thus peaceably procure relief, without trusting to despised petitions, or disturbing the public tranquility.

The next great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse

to attend, shall pass their sentence upon oath against him; a sentence that cannot injure him, without injuring their own reputation, and probably their interest also; as the question may turn on points, that, in some degree, concern the general welfare; and if it does not, their verdict may form a precedent, that, on a similar trial of their own, may militate against themselves.

Another right relates merely to the liberty of the person. If a subject is seized and imprisoned, tho by order of Government, he may, by virtue of this right, immediately obtain a writ, termed a Habeas Corpus, from a Judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into and redressed.

A fourth right, is that of holding lands by the tenure of easy rents, and not by rigorous and oppressive services, frequently forcing the possessors from their families and their business, to perform what ought to be done, in all well regulated states, by men hired for the purpose.

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

These are the invaluable rights, that form a considerable part of our mild system of government; that, sending its equitable energy through all ranks and classes of men, defends the poor from the rich, the weak from the powerful, the

industrious from the rapacious, the peacable from the violent, the tenants from the lords, and all from their superiors.

These are the rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which, these colonies have hitherto so amazingly flourished and increased. These are the rights, a profligate Ministry are now striving, by force of arms, to ravish from us, and which we are, with one mind, resolved never to resign but with our lives.

These are the rights *you* are entitled to and ought at this moment in perfection, to exercise. And what is offered to you by the late Act of Parliament in their place? Liberty of conscience in your religion? No. God gave it to you; and the temporal powers with which you have been and are connected, firmly stipulated for your enjoyment of it. If laws, divine and human, could secure it against the despotic caprices of wicked men, it was secured before. Are the French laws in *civil* cases restored? It *seems so.* But observe the cautious kindness of the Ministers, who pretend to be your benefactors. The words of the statute are –that those "laws shall be the rule, until they shall be *varied* or *altered* by any ordinances of the Governor and Council." Is the "certainty and lenity of the *criminal* law of England, and its benefits and advantages," commended in the said statute, and said to "have been sensibly felt you," secured to you and your descendants? No. They too are subjected to arbitrary "*alterations*" by the Governor and Council; and a power is expressly reserved of appointing "such courts of *criminal, civil,* and *ecclesiastical* jurisdiction, as shall be thought proper." Such is the precarious tenure of mere *will,*

by which you hold your lives and religion. The Crown and its Ministers are impowered, as far as they could be by Parliament, to establish even the *Inquisition* itself among you. Have you an Assèmbly composed of worthy men, elected by yourselves, and in whom you can confide, to make laws for you, to watch over your welfare, and to direct in what quantity, and in what manner, your money shall be taken from you? No. The power of making laws for you is lodged in the governor and council, all of them dependent upon, and removeable at, the *pleasure* of a Minister. Besides, another late statute, made without your consent, has subjected you to the impositions of *Excise*, the horror of all free states; thus wresting your property from you by the most odious of taxes, and laying open to insolent tax-gatherers, houses, the scenes of domestic peace and comfort, and called the castles of English subjects in the books of their law. And in the very act for altering your government, and intended to flatter you, you are not authorized to "assess, levy, or apply any *rates* and *taxes*, but for the inferior purposes of *making roads*, and erecting and repairing *public buildings*, or for other *local* conveniences, within your respective towns and districts." Why this degrading distinction? Ought not the property, honestly acquired by *Canadians*, to be held as sacred as that of *Englishmen*? Have not Canadians sense enough to attend to any other public affairs, than gathering stones from one place, and piling them up in another? Unhappy people! Who are not only injured, but insulted. Nay more! —With such a superlative contempt of your understanding and spirit, has an insolent Ministry presumed to think of you, our respectable fellow-subjects, according to

the information we have received, as firmly to perswade themselves that your gratitude, for the injuries and insults they have recently offered to you, will engage you to take up arms, and render yourselves the ridicule and detestation of the world, by becoming tools, in their hands, to assist them in taking that freedom from *us*, which they have treacherously denied to *you*; the unavoidable consequence of which attempt, if successful, would be the extinction of all hopes of you or your posterity being ever restored to freedom: For idiocy itself cannot believe, that, when their drudgery is performed, they will treat you with less cruelty than they have us, who are of the same blood with themselves.

What would your countryman, the immortal *Montesquieu*, have said to such a plan of domination, as has been framed for you? Hear his words, with an intenseness of thought suited to the importance of the subject. —"In a free state, every man, who is supposed a free agent, *ought to be concerned in his own government*: Therefore the *legislative* should reside in the whole body of the *people*, or their *representatives*."—"The political liberty of the subject is a *tranquility of mind*, arising from the opinion each person has of his *safety*. In order to have this liberty, it is requisite the government be so constituted, as that one man need not be *afraid* of another. When the power of *making* laws, and the power of *executing* them, are *united* in the same person, or in the same body of Magistrates, *there can be no liberty*; because apprehensions may arise, lest the same *Monarch* or *senate*, should *enact* tyrannical laws, to *execute* them in a tyrannical manner."

"The power of *judging* should be exercised by persons taken from the *body of the people*, at certain times of the year, and pursuant to a form and manner prescribed by law. *There is no liberty*, if the power of *judging* be not *separated* from the *legislative* and *executive* powers."

"Military men belong to a profession, which *may be* useful, but *is often* dangerous."—"The enjoyment of liberty, and even its support and preservation, consists in every man's being allowed to speak his thoughts, and lay open his sentiments."

Apply these decisive maxims, sanctified by the authority of a name which all Europe reveres, to your own state. You have a Governor, it may be urged, vested with the *executive* powers, or the powers of *administration*. In him, and in your Council, is lodged the power of *making laws*. You have *Judges*, who are to *decide* every cause affecting your lives, liberty or property. Here is, indeed, an appearance of the several powers being *separated* and *distributed* into *different* hands, for checks one upon another, the only effectual mode ever invented by the wit of men, to promote their freedom and prosperity. But scorning to be illuded by a tinsel'd outside, and exerting the natural sagacity of Frenchmen, *examine* the specious device, and you will find it, to use an expression of holy writ, "a whited sepulcher," for burying your lives, liberty and property.

Your *Judges*, and your *Legislative Council*, as it is called, are *dependant* on your *Governor*, and he is *dependant* on the servant of the Crown, in Great-Britain. The *legislative, executive* and *judging* powers are *all* moved by the nods of a Minister. Privileges and immunities last no longer than his smiles. When he frowns, their feeble forms

dissolve. Such a treacherous ingenuity has been exerted in drawing up the code lately offered you, that every sentence, beginning with a benevolent pretension, concludes with a destructive power; and the substance of the whole, divested of its smooth words, is—that the Crown and its Ministers shall be as absolute throughout your extended province, as the despots of Asia or Africa. What can protect your property from taxing edicts, and the rapacity of necessitous and cruel masters? Your persons from Letters de Cachet, gaols, dungeons, and oppressive services? your lives and general liberty from arbitrary and unfeeling rulers? We defy you, casting your view upon every side, to discover a single circumstance, promising from any quarter the faintest hope of liberty to you or your posterity, but from an entire adoption into the union of these Colonies.

What advice would the truly great man before-mentioned, that advocate of freedom and humanity, give you, was he now living, and knew that we, your numerous and powerful neighbours, animated by a just love of our invaded rights, and united by the indissoluble bands of affection and interest, called upon you, by every obligation of regard for yourselves and your children, as we now do, to join us in our righteous contest, to make common cause with us therein, and take a noble chance for emerging from a humiliating subjection under Governors, Intendants, and Military Tyrants, into the firm rank and condition of English freemen, whose custom it is, derived from their ancestors, to make those tremble, who date to think of making them miserable?

Would not this be the purport of his address? "Seize the opportunity presented to you by

Providence itself. You have been conquered into liberty, if you act as you ought. This work is not of man. You are a small people, compared to those who with open arms invite you into a fellowship. A moment's reflection should convince you which will be most for your interest and happiness, to have all the rest of North-America your unalterable friends, or your inveterate enemies. The injuries of Boston have roused and associated every colony, from Nova-Scotia to Georgia. Your province is the only link wanting, to compleat the bright and strong chain of union. Nature has joined your country to theirs. Do you join your political interests. For their own sakes, they never will desert or betray you. Be assured, that the happiness of a people inevitably depends on their liberty, and their spirit to assert it. The value and extent of the advantages tendered to you are immense. Heaven grant you may not discover them to be blessings after they have bid you an eternal adieu."

We are too well acquainted with the liberality of sentiment distinguishing your nation, to imagine, that difference of religion will prejudice you against a hearty amity with us. You know, that the transcendant nature of freedom elevates those, who unite in her cause, above all such low-minded infirmities. The Swiss Cantons furnish a memorable proof of this truth. Their union is composed of Roman Catholic and Protestant States, living in the utmost concord and peace with one another, and thereby enabled, ever since they bravely vindicated their freedom, to defy and defeat every tyrant that has invaded them.

Should there e any among you, as there generally are in all societies, who prefer the favours of Ministers, and their own private interests, to the

welfare of their country, the temper of such selfish persons will render them incredibly active in opposing all public-spirited measures, from an expectation of being well rewarded for their sordid industry, by their superiors; but we doubt not you will be upon your guard against such men, and not sacrifice the liberty and happiness of the whole Canadian people and their posterity, to gratify the avarice and ambition of individuals.

We do not ask you, by this address, to commence acts of hostility against the government of our common Sovereign. We only invite you to consult your own glory and welfare, and not to suffer yourselves to be inveigled or intimidated by infamous ministers so far, as to become the instruments of their cruelty and despotism, but to unite with us in one social compact, formed on the generous principles of equal liberty, and cemented by such an exchange of beneficial and endearing offices as to render it perpetual. In order to complete this highly desirable union, we submit it to your consideration, whether it may not be expedient for you to meet together in your several towns and districts, and elect Deputies, who afterwards meeting in a provincial Congress, may chuse Delegates, to represent your province in the continental Congress to be held at Philadelphia on the tenth day of May, 1775.

In this present Congress, beginning on the fifth of the last month, and continued to this day, it has been, with universal pleasure and an unanimous vote, resolved, That we should consider the violation of your rights, by the act for altering the government of your province, as a violation of our own, and that you should be invited to accede to our confederation, which has no other objects that

the perfect security of the natural and civil rights of all the constituent members, according to their respective circumstances, and the preservation of a happy and lasting connection with Great-Britain, on the salutary and constitutional principles herein before mentioned. For effecting these purposes, we have addressed an humble and loyal petition to his Majesty, praying relief of our and your grievances; and have associated to stop all importations from Great-Britain and Ireland, after the first day of December, and all exportations to those Kingdoms and the West-Indies, after the tenth day of next September, unless the said grievances are redressed.

That Almighty God may incline your minds to approve our equitable and necessary measures, to add yourselves to us, to put your fate, whenever you suffer injuries which you are determined to oppose, not on the small influence of your single province, but on the consolidated powers of North-America, and may grant to our joint exertions an event as happy as our cause is just, is the fervent prayer of us, your sincere and affectionate friends and fellow-subjects.

FILED

JAN 3 1 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-681

SUPREME COURT OF THE UNITED STATES

October Term, 2007

WE THE PEOPLE, et al.,

Petitioners,

- against -

UNITED STATES, et al.,

Respondents

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Government is obligated to respond with specific, formal answers to the questions contained in Plaintiffs Petitions for Redress of Grievances regarding violations of the war powers, money, privacy and tax clauses of the Constitution of the United States of America.

Whether Plaintiffs, having so petitioned, have the Right to act to hold the Government accountable if the Government refuses to respond.

CERTIFICATION

With regard to the two corporate Plaintiffs, the We The People Foundation for Constitutional Education, Inc., and the We The People Congress, Inc., both are not- for- profit corporations, neither has a parent company and neither has issued any stock.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

A. ORIGINAL INTENT: REQUIRES THE COURT TAKE JURISDICTION

"On every question of the construction of the Constitution, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." Thomas Jefferson, Letter to William Johnson, Supreme Court Justice, 1823.

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 n.10, (1961).

This case arose because the Executive and Legislative branches took possession of a boundless field of power by stepping outside the boundaries drawn around their power by the war powers, money, tax and privacy clauses of the Constitution.

This case arose because the People claimed and exercised their fundamental, natural Right to Petition the Government for Redress of Grievances, petitioning the Executive and all 535 members of Congress to reconcile the differences between the Iraq Resolution and the war powers clauses, the Federal Reserve System and the money clauses, the USA Patriot Act and the privacy clauses, and the direct, un-apportioned tax on labor and the tax clauses.

This case arose because the Executive and the Legislative branches refused to respond to the People's repeated Petitions for Redress of the constitutional torts.

This case arose because the Executive aggressively retaliated against the People who claimed and exercised their fundamental, natural Right to

peaceably hold an unresponsive, tyrannical Government accountable to the Constitution, by retaining their money when all other means of Redress were proven ineffectual.

This case arose as the People turned to the independent Judicial branch, empowered to bind the other two branches with the chains of the constitution, regardless of the level of practical difficulty, political consequence or embarrassment.[1]

This case arose because the People needed to present to the non-responsive, tyrannical agents of the Executive branch a Judicially drawn declaration of the obligations of the Government under the Petition Clause.

This case arose because no court had ever declared the full contours of the meaning of the last ten words of the *First Amendment*, that is, the natural Rights of free individuals, acting in their private capacities, to Petition their Government for Redress of constitutional torts, the obligation of the Government to consider and respond to such Petitions, and the natural Rights of free individuals to act to peaceably hold a non-responsive, recalcitrant Government accountable to the Constitution.

This case arose because of Plaintiffs' claim and reliance upon the historical context and purpose of the Petition Clause – the Framer's intent behind the last ten words of the *First Amendment*.

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[1] Common knowledge.

Defendant has argued it is not obligated to respond to the People's Petitions for Redress of constitutional torts.

The record of this case includes the as yet un-refuted historical context and purpose of the Petition Clause, clearly demonstrating original intent and the substantive breadth of the Right.

The Record before the Court shows the Framer's intended Petition to serve a vital balancing role in a new political culture of reciprocal obligation and a carefully crafted balance of power between the People and the Government.

The Record before the Court shows that for decades following the American Revolution, Petitions might have been rejected on the merits, or might have been dismissed as totally frivolous or libelous, but they were never rejected on any ground akin to standing; their reception, consideration and response was largely automatic, even Petitions from the powerless disenfranchised, the dispossessed who were otherwise politically penurious, and the despised.

The Record before the Court shows the Framers' defended Petitioning as a natural, constitutionally guaranteed Right, the key vehicle necessary for the protection of the People from Government tyranny – the protector of all other Rights.

The Record before the Court shows one need look no further than the Declaration of Independence for evidence of the extraordinary importance the Framers' put on Petitioning and Government's obligation to consider and respond. The Framer's

intent is evident not only from the Declaration's enumeration preceding the ultimate complaint, but from the ultimate complaint itself -- that the colonists' Petitions fell on the King's deaf ears. This was the "capstone grievance." The Framers considered the Government's (the King's) ultimate violation was its sundering of the bonds of deference and obligation on which the hierarchial, but mutually respectful, legitimacy rested.

The following words of the Declaration survived intact through each edit of the text, save for the addition of "free" before "People."

> "In every stage of these oppressions we have petitioned for Redress in the most humble terms: Our repeated petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People."

The Record before the Court shows the Framers' intent was that Petitions be a <u>more active form of participation in self-governance than voting</u>

The Record before the Court shows the Framers' intent was that Petitions would be posted in public places, advertised in newspapers, and duplicated for simultaneous circulation, believing that the result of publicity and argument, especially when combined with their quasi-judicial status, would ensure that a Grievance was heard, investigated, deliberated, and acted upon.

The Record before the Court shows the Framers' intent behind the Petition Clause was reflected in the intensity that the colonists brought to the project of developing their State Republics, focusing not just on the creation of the machinery of government, but more so on the articulation of mechanisms that would ensure the participation of the citizenry in the activities of government. The clauses designed to preserve freedom and promote reasoned decisions by the government were drafted amidst an unprecedented popular discussion of ideas of representation, popular sovereignty, power of the people, and the public good.

The Record before the Court shows the Framers' intent that the early Constitutions, both State and Federal, reflect the aspirations of popular sovereignty via direct participation in the process of governance.

The Record before the Court shows the Framers' intent that those who governed the People were to be not the People's "betters," but their servants, that the old hierarchy of deference should no longer obtain, that government officials were due respect, but not obeisance.

The Record before the Court shows the Framers' intent that Petitions not be the prayers of supplicants, but the missives of a free people to their servants, that respect replace deference, and that it run both ways, as befitted a free people governing themselves.

The Record before the Court shows that throughout the debates preceding the adoption of the State

Constitutions, the federal Constitution and the Bill of Rights, no mention of the Petition was negative.

The Record before the Court shows the issues of popular sovereignty and representation that had animated more than twenty years' discussion of the relationship between citizen and government replicated themselves in miniature in the debate over the Right to Petition during the debates leading up to the adoption of the Bill of Rights. Petitioning was taken as a foundational part of the legislative process.

The Record before the Court shows that the Executive and Legislative branches have, in effect, abolished the Petition Clause without a constitutional amendment. In 1836, the House of Representatives, with the acquiescence of the Senate and the President, adopted the antebellum gag rule covering petitions from abolishionists.. For the first time in American history, the Government committed treason to the Constitution, acting as master with the People as servants, deciding it was not required to listen or respond to the People's Petitions for Redress of a constitutional tort – slavery. [2]

The Record before the Court shows John Quincy Adams led the fight to repeal the gag rule; it took eight years to do so, but by then Government's perception of and respect for the Constitution and the Petition Clause had changed. The Government

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[2] Had the Government honored the Petition Clause of the First Amendment, slavery might have ended without the Civil War.

saw that it could turn a blind eye to the Constitution ***and*** avoid being held accountable to anything but the collective majority.

The Record before the Court shows, however, that the Framers' intent was to recognize the Right to Petition (and the obligation of the Government to listen, deliberate and respond) as a natural, fundamental, unalienable Right, and that the Right to Petition would protect all other Rights.

The Record before the Court shows that following the gag rule, abolitionists and other Petitioners failed to stand up in defense of Petition and the Government's obligation to consider and respond. Instead, they began to alter the form of their Petitions. Petitions became abbreviated and anemic, seeking no real Redress as such, becoming mere pronouncements of political desire.

The Record before the Court shows that in place of the classic, constitutionally protected Petition, the gag rule proponents substituted a thoroughly liberal vision. They argued that the Right was co-extensive with voting. For its force, according to them, Petitioning depended on the number of potential voters who signed. Brute political power grounded in the franchise, rather than reciprocal obligation deeply rooted in social and political cohesion, underlay this politically convenient, but defective assertion.

The Record before the Court shows the Framers' intent behind the Petition Clause conflicts with the present Government's opinion (expressed in its filings in this case), that it is bound by no obligation

to listen or respond to the People's Petitions for Redress of Grievances because the Petition Clause does not state, in plain language that the Government has to listen or respond.

The Record before the Court shows the Framers' intent was to create a constitutional Republic based on individual Rights, not a democracy based on majority rule, with all matters couched in political terms, where the Rights of the individual and minority could be interpreted and denied by the majority.

The Record before the Court demonstrates that without a declaration by this Court of the full contours of the Right to Petition, based on the Framers' intent, the Executive and Legislative branches will have been successful in transforming the nation from a constitutional republic to a democracy, emphatically eschewed by the Founders in the interest of limited government, popular sovereignty and individual Rights, Freedoms and Liberties.

In the case before the bar the original intent of the Petition Clause was argued in both lower courts.

In her separate opinion, DC Circuit Judge Rogers further distinguished the instant case from *Smith* and *Knight* by recognizing that the historical context and purpose of the Petition clause, was not referred to or argued in *Smith* and *Knight*. Referring to the "precedent" of *Smith* and *Knight*, Judge Rogers wrote, "That precedent, however, does not refer to the historical evidence and we know from the briefs in *Knight* that the historical argument was not

presented to the Supreme Court." *We The People v. United States*, 485 F.3d 140,145.

Even where the plain language yields a clear interpretation, this Court has on many, many occasions rejected a plain language approach to construction in favor of a construction that accords weight to the original intent – that is, the historical context and the underlying purpose of the provision at issue. *Id*, 145-149.

B. ABDICATION OF DUTY AND TREASON TO THE CONSTITUTION NOT TO TAKE JURISDICTION

According to its own precedent, this Court would be abdicating its duty and committing treason to the Constitution if it fails to grant certiorari under the facts and circumstances of this case.

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid: but we cannot avoid them. All we can

> do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (plaintiff's emphasis). *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

The People are asking the Judiciary to define the contours of the meaning of the last ten words of the First Amendment. Nothing is more important to a free People faced with an Executive and Legislative who act and say with increasing frequency that "Events have overtaken the Constitution. The Constitution is merely a piece of paper. The Constitution is anachronistic and inappropriate."

The full contours of the meaning of the Petition Clause has remained undeclared by the Judicial branch since 1791. There was little need until now for the People to depend so absolutely on the power of the Right to Petition Government for Redress of constitutional torts.

The Constitution is all that stands between the People and total tyranny and despotism. It is unable to defend itself. If a free people can't defend in an Article III court, who can?

The court most certainly has the obligation to hear and determine first impression cases such as this, dealing as it does with the construction of the Constitution. That is its essential role. To fail to do so would be an abdication of its primary duty at best,

and "treason to the constitution" at worst, either way, a sure sign that the United States as well as her court system has been compromised at the highest levels.

C. SHAMEFUL NOT TO TAKE JURISDICTION

It would be shameful for the Court to fail to hear this case involving a first impression question of extreme public importance, i.e., the constitutional meaning of the last ten words of the *First Amendment*, while agreeing to hear many cases of far lesser import, including the probate/bankruptcy/defamation case of Anna Nicole Smith, where, ironically, one can find the following statement quoted from Justice Ginsburg (*Marshall v. Marshall,* at page 6);

> "In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821).

CONCLUSION

This is demonstrably a first impression case dealing with the construction of the First Amendment.

Appellants' emphasis on contemporary historical understanding and practices is consistent with the

Court's traditional interpretative approach to the *First Amendment.*

With all due respect, *Smith* and *Knight* are not on point. In addition, original intent was not argued in either *Smith* or *Knight.*

This case involves a fundamental Right involving the balance of power between the People and the Government as carefully crafted by Framers. To deny certiorari would be a denial of Due Process, arbitrary and capricious and an abuse of judicial discretion.

If it is only the non-dispositive "precedent" of *Smith* and *Knight* that is being used by the Court to deny the Appellants a declaration of their Rights under the Petition Clause, then the Courts have failed the Nation, the Constitution and the People and ought to be held accountable.

Never mind that understanding Petition's history unsettles the Executive's and Legislative's comfortable, self-serving assumptions about modern constitutionalism and the balance of power between the People and the Government.

History of the Right to Petition tells us that popular intervention in governance (constitutional, unmediated and personal) has remained invisible since the early nineteenth century because of our contemporary fixation on elections and majority rule (mass politics) as the instrument of political participation. The Right may have been forgotten, but it has not been lost. Now, more than ever, it needs to be revived.

The original intent of the Framers was that a Petition be an affirmative, remedial Right which required governmental hearing and response. Petitioning was to be a Right enjoyed by all persons and one which all classes and strata exercised to some degree, both individually and collectively. To miss both the mandatory and participatory features of the Right to Petition is to put on modern blinders, seeing only in enfranchisement the instrument of political participation.

Appellants pray the Court will grant certiorari, and be willing to remain open to an historical explanation that involves not just a modern process-based understanding of the structure of government, but also one that suggests the substantive breadth of the Right to Petition Government for Redress of constitutional torts as intended by the Framers.

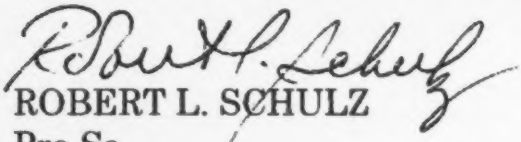
Shall the People in republican America, with its written Constitution for the protection of the public rights and a body of strictly limited powers, now be forbidden to do that which the Framers intended?

Shall the People have no guarantees for the public and individual liberties except laws and prescriptive usages, all of them confessedly at the will of an omnipotent Executive and Legislative?

Forbid it Reason. Forbid it Justice. Forbid it Liberty. Forbid it the beatified spirits of the revolutionary sages, who stand vigilant watch in heaven over the safety and destiny of this Republic.

CERTIFICATION

This petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2 and is presented in good faith and not for delay. The text has 2994 words including footnotes.



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